(1)

Supreme Court, U.S.
FILED

No. 03-03 425 SEP 17 2003

IN THE

Supreme Court of the United States

PATSY KEEN,

Petitioner,

v.

DIANA WEAVER, INDEPENDENT EXECUTRIX OF THE ESTATES OF FRANCIS J. WEAVER AND RITA MARIE WILSON WEAVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

MAURICE BRESENHAN, JR.
Counsel of Record
PASCAL PAUL PIAZZA
CYNTHIA KEEN PERLMAN
ZUKOWSKI & BRESENHAN, L.L.P.
1177 West Loop South, Suite 1100
Houston, Texas 77027
(713) 965-9969

Attorneys for Petitioner

183021

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

104 pp

QUESTIONS PRESENTED

1. The *text* of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* (ERISA) commands the uniform rule of national application that the plan administrator shall distribute the benefits under an ERISA plan to the beneficiary *designated by the plan participant* unless one of the textual exceptions apply. In a 5-4 decision, the majority of the Texas Supreme Court creates a new exception to the text of ERISA through an alleged federal common law that yields the same result as the preempted Texas redesignation statute. The dissent rejects such a new exception in reliance upon the text of ERISA. Did the majority of the Texas Supreme Court err:

A. By creating a state law rule re-labeled as a federal common law that is preempted by ERISA's broad preemption clause;

B. By creating a rule that conflicts with the text of ERISA;

C. By creating a rule in conflict with this Court's decisions in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and that alters the text of ERISA through some nascent federal common law when there is no such alleged applicable federal common law;

D. By creating a rule of application that conflicts with the textually driven uniform national standards for such a rule mandated by this Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) [*Egelhoff*];

E. By creating a rule that replaces ERISA's textually driven uniform rule of national application with an irrebuttable presumption that a plan participant spouse can never designate or retain a former spouse as a plan beneficiary after a divorce;

F. By creating a rule that re-writes the text of ERISA to deprive the right of a plan participant to designate or retain the beneficiary of choice;

G. By creating a rule in conflict with *Egelhoff* that replaces ERISA's textually driven uniform rule of national application with a fact-intensive variable driven rule that will vary from case to case and from state to state; and

H. By creating a rule that perpetuates the irreconcilable conflict between the "strict plan" cases, e.g. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) and *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990), and the "variable common law waiver" cases, e.g. *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990) and *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78 (4th Cir. 1996) such that the obligations of plan administrators vary from jurisdiction to jurisdiction in lieu of the uniform national standard that ERISA requires.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
I. Factual Background	1
II. Proceedings Below	2
Summary of Argument	3
Reasons for Granting the Petition	7
I. The Majority Opinion In *Keen* Conflicts With The Text Of ERISA, Impermissibly Relies Upon A Non-Existent Federal Common Law, Conflicts With The Decisions Of This Court And Creates A Preempted Rule Of State Law That Together Or Singularly Usurps	

Contents

		Page
	The Simple Uniform Rule Of National Application For The Distribution Of Plan Benefits Required By ERISA.	7
	A. The Text of ERISA: the Unambiguous Simple Rule	7
	B. Preemption Precludes Looking Beyond the Text of ERISA	9
	C. There is No Available Federal Common Law to Look Beyond the Text of ERISA	12
	D. The Majority Rule in *Keen* Conflicts with the Anti-Alienation Text of ERISA	15
II.	There Is An Irreconcilable Conflict Between The Holdings In The Case Law (Including Decisions Of This Court) That "Strictly Follow" The Text Of ERISA And The Holdings In The "Variable Common Law" Case Law That Seek To Modify The Text Of ERISA Such That The Obligations Of Plan Administrators Vary From Jurisdiction To Jurisdiction In Lieu Of The Uniform National Standard That ERISA Requires.	18
Conclusion		20

TABLE OF CITED AUTHORITIES

Page

CASES

Estate of Altobelli v. International Business Machines Corp., 77 F.3d 78 (4th Cir. 1996) ..... ii, 18

Barnett v. Barnett, 67 S.W.3d 107 (Tex. 2001) 13

Boggs v. Boggs, 520 U.S. 833 (1997) 10, 16

Brandon v. Travelers Ins. Co. 18 F.3d 1321 (5th Cir. 1994) (*cert. denied*, 513 U.S.1081, 1995) 19

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) ..... *passim*

Firestone Tire and Rubber v. Bruch, 489 U.S. 101 (1989) 13, 14

Fox Valley & Vacinity Const. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990) ..... ii, 18, 19

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 16, 17

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 10

Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) 19

Manning v. Hayes, 212 F.3d 866 (5th Cir. 2000) ... 19

Cited Authorities

Page

McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) ..... ii, 17-18, 19

Melton v. Melton, 324 F.2d 941 (7th Cir. 2003) ... 19

Mertens v. Hewitt Associates, 508 U.S. 248 (1993) ..... i, 12, 17

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 10

O'Melveny & Meyers v. F.D.I.C., 512 U.S. 79 (1994) ..... i, 12

Patterson v. Shumate, 504 U.S. 753 (1992) 16, 17

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) ... 16

Silber v. Silber, 99 N.Y.2d 395 (N.Y. App. 2003) .. 19

STATUTES AND REGULATIONS

28 U.S.C. § 1257(a) 1

29 U.S.C. § 1001, *et seq.* i

29 U.S.C. § 1002(7) 8

29 U.S.C. § 1002(8) 8

Cited Authorities

	Page
29 U.S.C. § 1056	17
29 U.S.C. § 1056(d)(1)	16
29 U.S.C. § 1056(d)(3)(A)	16
29 U.S.C. § 1102(a)(1)(D)	8
29 U.S.C. § 1102(b)(4)	8
29 U.S.C. § 1104(a)(1)(D)	19
29 U.S.C. § 1132(a)(1)(B)	13
29 U.S.C. § 1144(a)	9
29 U.S.C. § 1144(c)	10

OTHER AUTHORITIES

Amicus Curiae Brief of the Secretary of Labor .... http://www.dol.gov/sol/media/briefs/main.htm	6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Texas Dated June 19, 2003 ..... 1a

Appendix B — Opinion And Order Of The Court Of Appeals Of Texas, Waco Dated April 18, 2001 ..... 26a

Appendix C — Findings Of Fact And Conclusions Of Law Of The County Court, Dallas County, Texas Filed July 6, 1999 ..... 46a

Appendix D — Final Judgment Of The County Court, Dallas County, Texas Dated June 18, 1999 ..... 56a

Appendix E — Relevant Statutes 62a

OPINIONS BELOW

The opinion of the Supreme Court of Texas (Pet. App. A) is reported at __ S.W. 3d __, 46 Tex. Sup. Ct. J. 804 (2003). The opinion of the Waco Court of Appeals (Pet. App. B) is reported at 43 S.W.3d 537 (Tex. App. Waco 2001).

JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 19, 2003. This Court has jurisdiction of this proceeding by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 24.1(f), the pertinent constitutional and statutory provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

I. Factual Background

Francis J. (Frank) Weaver and Patsy Keen (Patsy) were married in 1967. During a portion of their marriage, Frank was employed by Baylor College of Medicine. In 1972, Frank purchased two annuity contracts issued by Teacher's Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF). At all times during and after the marriage, Frank was the plan participant with the exclusive right to designate the plan beneficiary. He named Patsy as the primary beneficiary of those annuity contracts. Baylor College of Medicine made contributions to the annuity

contracts until 1980 when Frank terminated his employment. In 1982, Frank and Patsy divorced. As part of the property settlement, the divorce court decided the community property issues that it had the jurisdiction to divide. Frank received the annuity contracts as his sole and separate property. Patsy relinquished any interest that she had in the plans. Frank never made any contributions to the plans after his divorce from Patsy.

Frank married Diana Weaver (Diana) in 1983. They were married for eleven and one-half years before his unexpected death in 1995. During this time, Frank did not change the plan beneficiary. Frank received annual notices reminding him that Patsy remained the designated beneficiary. He received the forms to change the plan beneficiary. At the time of Frank's death, Patsy was the designated beneficiary of Frank's TIAA-CREF annuity contracts. The plans' administrators, relying on this designation and the plan documents, paid benefits to Patsy until TIAA-CREF and Petitioner were sued in this case.

II. Proceedings Below

Initially, Rita Marie Wilson Weaver (Rita), Frank's mother and the designated contingent plan beneficiary, sued Patsy and the plans to recover the plan benefits. Upon Rita's death, Diana, as Rita's independent executrix and Frank's independent executrix, substituted and joined as the plaintiff. The plans interpleaded the funds and were dismissed with the obligation to pay the benefits according to the final judgment.

Diana's claims as the successor for Frank were never clear. Diana's claims as the successor for Rita were brought

for breach of contract, conversion, waiver and redesignation under the Texas redesignation statute. Patsy brought claims for compliance with ERISA and the beneficiary designation.

After a bench trial, the trial court granted a final judgment for Patsy. [Pet. App. D]. The trial court issued findings of fact and conclusions of law. [Pet. App. C]. The trial court found that ERISA preempted the Texas redesignation statute, that ERISA controlled, that the plan beneficiary designation controlled and that Patsy had not given up any rights to be the designated plan beneficiary by waiver, estoppel or otherwise.

On appeal, the Waco intermediate appellate court reversed. It found that ERISA preempted the Texas redesignation statute, but then curiously held that the Texas redesignation statute could be revived through a federal common law.

On further appeal, a sharply divided Texas Supreme Court in a 5-4 decision affirmed the Waco intermediate court of appeals but on different grounds with the same effect. The majority adopted a federal common law of waiver that coincidentally effected the same redesignation contemplated by the preempted Texas redesignation statute. As detailed by the dissent, the majority engaged the errors that form the basis of this petition.

SUMMARY OF ARGUMENT

As this Court held in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), ERISA unambiguously supplies each plan administrator with a textually driven, unambiguous, easily applied, uniform and harmonious national rule to distribute

plan benefits to the participant designated plan beneficiary. The majority opinion of the Texas Supreme Court is one of the most recent cases in the vanguard of the judicial assault on *Egelhoff* and the text of ERISA. The Court must intervene to re-establish uniformity and order and respect for the prudence of this Court and the text of ERISA.

The question in this case is whether the plan administrator of an ERISA employee pension benefit plan must pay according to the plan's designated beneficiary as the text of ERISA dictates or whether the plan administrator must pay according to the unchartered variables of some imported law of equitable waiver. This case, accordingly, involves the core concepts under ERISA about the textual scope of the right to designate or retain the beneficiary under an ERISA plan and the accompanying payment of benefits to that designated beneficiary.

At all times during the marriage and afterwards, Frank alone had the sole right to designate or retain the beneficiary under the plan. Frank's exclusive right to designate or retain the beneficiary controlled whether Patsy could claim any community property interest in the plan or whether the plan was Frank's pre- or post marital separate property. Frank's exclusive right to designate or retain the beneficiary survived the divorce decree and any agreement of the parties.

Frank exercised his exclusive right and, for his own reasons, maintained Patsy as the sole beneficiary under the ERISA plan. Thirteen years and a second marriage did not persuade Frank to change the beneficiary. Annual reminders that Patsy was the beneficiary and available annual beneficiary change forms did not persuade Frank to change the beneficiary. The plan administrator, following the text of

ERISA, sought to pay the benefits to Patsy as she was the named beneficiary.

In a 5-4 decision, a majority of the Texas Supreme Court holds that the plan administrator cannot rely upon the text of ERISA and simply pay Patsy as the designated beneficiary. Instead, the majority requires the plan administrator to decide whether Frank could not exercise his right to designate or retain the beneficiary. It shifts the focus from Frank's right to designate or retain to a focus on Patsy's alleged waiver under some imported equitable doctrine of waiver that is not contained in the text of ERISA. The majority holds that the divorce agreement or adjudication of any right, title and interest in, to or under any community property character of a plan irrebuttably presumes that Frank could never thereafter designate or retain Patsy as the plan beneficiary after the divorce.

The dissent applies the literal text of ERISA. It refuses to superimpose amorphous equitable dimensions to an otherwise unambiguous text.

Curiously, both the majority and the dissent agree (1) that the text of ERISA requires the plan administrator to pay Patsy as the designated beneficiary, (2) that the text of ERISA admits exceptions to that requirement of which none apply in this case, (3) that the Texas Supreme Court recently affirmed that equitable principles cannot be used to amend the otherwise unambiguous text of ERISA, (4) that ERISA preempts the Texas redesignation statute, (5) that the Texas intermediate appellate court erred in using a federal common law to reach the same result as the preempted Texas redesignation statute, and (6) that the text of ERISA yields a simple rule that is easily applied by plan administrators.

Yet, despite these concurrences, the majority diverges from the dissent. The majority eschews the textually driven parsimony of ERISA for a fact-intensive driven equitable waiver analysis that, like the Texas intermediate appellate court (but using different labels), used a federal common law to achieve the same effect as the preempted Texas redesignation statute. There is an analytical gap between the majority's reasoning and the majority's holding that the equitable doctrine of waiver cannot fill.

This Court must review the majority's holding. First, it creates a state law rule that is preempted by ERISA. Second, it conflicts with the text of ERISA. Third, it conflicts with this Court's holding in *Egelhoff*. Fourth, it uses a non-existent federal common law to amend the text of ERISA. Fifth, it replaces a simple rule of administration with an unpermitted irrebuttable presumption. Sixth, it replaces a harmonious uniform rule of national application with a fact-intensive variable driven rule that will vary from case to case and state to state. Seventh, it perpetuates a conflict in the law between those cases that enforce the text of ERISA as written and those that do not. Eighth, it eviscerates the uniformity inherent in ERISA. Ninth, it impermissibly conflicts with the anti-alienation provisions of ERISA.

Applicable to both I and II above is the stated position of the Secretary of Labor in his Amicus brief filed with and argued before the Texas Supreme Court. (The brief is available at http://www.dol.gov/sol/media/briefs/main.htm).

REASONS FOR GRANTING THE PETITION

I. THE MAJORITY OPINION IN *KEEN* CONFLICTS WITH THE TEXT OF ERISA, IMPERMISSIBLY RELIES UPON A NON-EXISTENT FEDERAL COMMON LAW, CONFLICTS WITH THE DECISIONS OF THIS COURT AND CREATES A PREEMPTED RULE OF STATE LAW THAT TOGETHER OR SINGULARLY USURPS THE SIMPLE UNIFORM RULE OF NATIONAL APPLICATION FOR THE DISTRIBUTION OF PLAN BENEFITS REQUIRED BY ERISA.

The majority opinion in *Keen* has further separated the plan administrator's obligation to pay plan benefits according to the plan terms from its mooring in the text of ERISA and this Court's decisions construing that same text. This Court should cure this suffusing legal error that, if not cured, will destroy the simple, uniform and harmonious rule of national application required by ERISA and this Court. The Court should grant this petition to review this case, should hear this case, should reverse the Texas Supreme Court's decision in *Keen* and should order the distribution of all plan benefits to Patsy.

A. The Text of ERISA: the Unambiguous Simple Rule:

The text of ERISA supplies the proper starting point. This starting point yields the proper analysis that avoids conflicts with the text of ERISA and with the opinions of this Court.

Among its many provisions, the text of ERISA vests Frank, as the plan beneficiary, with the right to designate the

beneficiary of the ERISA employee pension plan. ERISA §§ 1002(7) and 1002(8). Predicated on this vested right, ERISA recites that the plan must specify the basis upon which payments are to be made, states that the plan administrator must administer the plan in accordance with the plan documents and then directs that the plan administrator must pay the plan benefits to the designated beneficiary. ERISA §§ 1002(8), 1102(a)(1)(D) and 1102(b)(4).

The plans, in this case, implement the text of ERISA. They also vest Frank with the sole right to designate the beneficiary and direct the plan administrator to pay the plan benefits to the designated beneficiary. They also provide a procedure for Frank to change the designated beneficiary – a procedure that Frank never invoked.

ERISA and the plans also admit two exceptions to the directed payment to the designated beneficiary. Undisputedly, neither exception applies.

The text of ERISA speaks volumes by what it says and what it does not say. It sets forth a simple direction that is easily applied uniformly and nationally. The majority of the Texas Supreme Court admits this. *Keen*, 46 Tex. Sup. Ct. J. at 805-806. The text of ERISA proves that Congress knows how to impose exceptions to this straight-forward rule and that Congress only imposes two inapposite exceptions. The text of ERISA does not admit any exception for the type of waiver based upon the construction of a state law divorce recognized in *Keen*.

It also states that Frank's ability to designate or retain a plan beneficiary is limited only by his personal choice. It does not limit his choice to relatives. He can choose a

former spouse, his mother or even a totally unrelated person. He can chose someone who has an interest in the plans or someone who does not have any interest in the plans. He may choose someone, like Patsy, who no longer has a community interest in the plans. He can change his mind and choose to designate Patsy regardless of what divorce settlement had been reached.

It also states that the plan administrator does not have to go behind Frank's choice. The plan administrator does not have to ask why Frank respectively designated or retained his former spouse and his mother, rather than his then current wife, as the designated primary and contingent beneficiaries. The plan administrator does not have to inquire into the clean hands or unclean hands of the plan participant or the designated beneficiary. The plan administrator does not have to inquire into the speed, diligence or sloth of the plan participant or the plan beneficiary. The text of ERISA gives fruition to the ordered liberty of personal choice of the plan participant.

B. Preemption Precludes Looking Beyond the Text of ERISA:

The majority cannot rely upon Texas law to alter the text of ERISA. The majority does so and thereby impermissibly creates conflicts with the text of ERISA and the opinions of this Court.

The text of ERISA prohibits attempts to add exceptions to the text of ERISA directly or indirectly through state law. It states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan." ERISA § 1144(a). It then broadly defines "state law" to

include all laws, rules, decisions, regulations, or other state action having the effect of law of any state. ERISA § 1144(c).

This Court confirms the broad scope of preemption under ERISA. *Egelhoff*, 532 U.S. at 146. It further confirms that this preemption covers any state law that has an affect on the objectives of ERISA. *Id.* at 147. It concludes that the regulation of employee welfare benefit plans is exclusively a federal concern. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 656 (1995).

As such, the text of ERISA is the ultimate touchstone of any preemption analysis. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). Any state law that relates to or is connected to a core textual obligation, such as the plan administrator's obligation to pay the plan benefits to the designated beneficiary, is preempted. *Egelhoff*, 532 U.S. at 147-148. Any state law that affects the designation of a beneficiary under an ERISA plan is preempted. *Boggs v. Boggs*, 520 U.S. 833, 845 and 854 (1997). Any state law that interferes with nationally uniform plan administration and that subjects a plan administrator to a rule that varies by state or by the facts of each case usurps the purpose of ERISA and is preempted. *Egelhoff*, 532 U.S. at 148.

The majority opinion in *Keen* is a state law under ERISA § 1144(c). Moreover, its reliance upon the legal and factual effect of a Texas divorce decree or of a Texas agreement incident to the Texas divorce decree to define the plan administrator's obligation encumbers the plan administrator with construing the effect of Texas law to define the scope of the plan administrator's obligation. Consider the majority's own conjecture about the effect of the facts comprising

waiver: "If the agreement were limited to Section 4.02, it might not be sufficient to waive Patsy's beneficiary interest." *Keen*, 46 Tex. Sup. Ct. J. at 808. Therefore, each plan administrator will have to review the scope of each divorce decree or each divorce agreement as those scopes are defined under Texas law, to determine whether the scope of the decree or agreement will comprise a waiver. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

The majority in *Keen* grounds its approach in a rule that looks to see if the effect of the Texas divorce decree or Texas agreement incident to divorce waives ". . . Patsy's beneficiary interest." The majority has shifted the analysis from ERISA's directive that Frank has the sole right to designate the plan beneficiary regardless of whether the beneficiary owns an interest or not in the plan, to a focus of whether Patsy can designate herself as a plan beneficiary. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

The majority concedes that the Texas current and prior redesignation statutes [Pet. App. E] are preempted. *Keen*, 46 Tex. Sup. Ct. J. at 807. That means that a Texas divorce decree or a Texas divorce agreement cannot be the nexus through which Patsy is redesignated as the plan beneficiary; any such attempt to use a Texas divorce decree or Texas divorce agreement is preempted. *Egelhoff*, 532 U.S. at 148-152. The majority cannot escape this preemption by achieving the same result through a different label. The majority even admonishes the Texas intermediate appellate court for doing this. *Keen*, 46 Tex. Sup. Ct. J. at 807. It then did the exact admittedly forbidden same thing as the Texas intermediate appellate court. *Keen*, 46 Tex. Sup.

Ct. J. at 805-808. It redesignated Patsy through the nexus of the Texas divorce proceeding. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

The majority indulges an unstated, but imposing, presumption that Frank cannot choose to designate or retain Patsy as a plan beneficiary after the divorce because of the Texas divorce decree and Texas divorce agreement. The majority admits no exceptions and thereby erects an irrebuttable presumption using the bricks of Texas law measured through the Texas divorce decree and the Texas divorce agreement. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

C. There is No Available Federal Common Law to Look Beyond the Text of ERISA:

The majority in *Keen* cannot "find" a federal common law to alter the text of ERISA. The majority so found and thereby impermissibly creates more conflicts with the text of ERISA and the opinions of this Court.

Under ERISA, this Court affirms that a federal common law cannot be used to revise the text of ERISA. *Mertens v. Hewitt Associates*, 508 U.S. 248, 259 (1993). This affirmation is an application of the general rule that there is no available federal common law that allows a court to create exceptions to an otherwise unambiguous statute. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). The majority, however, used an alleged federal common law to create a new exception to the text of ERISA in conflict with *Mertens* and *O'Melveny*.

The majority asserts that there is a general federal common law of trust under ERISA that is a starting point for

courts to wreak havoc on the text of ERISA. *Keen*, 46 Tex. Sup. Ct. J. at 806. The majority's citation to *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 110 (1989) is misplaced.

In *Firestone*, this Court stated that, "[a]lthough [ERISA] is a 'comprehensive and reticulated statute,' . . . ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations. *To fill this gap*, federal courts have adopted the arbitrary and capricious standard. . . ." *Id.* at 109. [citations omitted] [Emphasis Added]]. *Firestone* represents one of the few and restricted times this Court found a federal common law, namely to fill a gap in the text of ERISA necessary for the plan administrator to discharge its fiduciary obligations.

This Court explains that there is no gap in the text of ERISA that mandates that the plan administrator must pay the designated plan beneficiary according to the plan. *Egelhoff*, 532 U.S. at 148 and fn. 1. It rejects any attempt to create a gap in the text simply because this language does not list every possible payment scenario, including waiver. *Id.*

The majority, however, holds that there is a gap because the text of ERISA does not mention waiver. The majority did exactly what this Court holds a court cannot do. The majority rule in *Keen* conflicts with *Egelhoff*.

The majority recognizes that the Texas Supreme Court had recently held that equitable trust principles could not be used to interfere with uniform ERISA administration. *Keen*, 46 Tex. Sup. Ct. J. at 807, *citing, Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001). Yet, it dismisses this prior correct

holding as a plurality decision that invited the development of a federal common law. *Id.* The dissent correctly notes the lack of any rationale for the majority's argument. *Keen*, 46 Tex. Sup. Ct. J. at 812.

The majority's strained construction of its own precedent underpins the majority's improper ruling. It also explains why the majority never addresses the true wellspring of the alleged federal common law.

The majority relies upon *Firestone*, but it does not discuss that the trust law it imports to alter the text of ERISA is the full panoply of trust law developed over the two plus centuries of American jurisprudence. That jurisprudence includes (ERISA preempted) state case law and state statutory law and treatises on trusts and the restatement of the law of trusts. *Firestone*, 489 U.S. at 954.

As such, under the majority rule in *Keen*, a plan administrator will first have to wait until the federal courts map out the contours of the alleged federal common law. With eleven circuits and multiple federal district courts, plan administrators can expect many years of uncertainties and years of conflicting decisions before some uniform rules emerge to decide who a proper beneficiary will be. It is also unclear whether all or only part of the entire body of equitable trust law and equitable maxims will be incorporated into the new law of alleged waiver. The dissent correctly points out that there presently is a lack of unanimity among the case law the majority relies upon as to what the actual elements of an alleged waiver are. *Keen*, 46 Tex. Sup. Ct. J. at 811-812. In short, a plan administrator will not know for a long time how to determine a proper beneficiary if the majority's waiver exception applies. There will not be a uniform national rule of plan administration.

The wake of this rule will be that a plan administrator will have to conduct a case-by-case, fact-intensive analysis of each decision to pay plan benefits. For example, the plan administrator will have to determine the intent of the plan participant, if a designated plan beneficiary "waived" some rights, whether the plan participant "waived" the "waiver," whether the plan participant was diligent or slothful or whether all parties have clean hands. This resulting morass is the antithesis to ERISA's stated goal to have a simple, harmonious and national administration unencumbered by fact findings and unchartered variables.

The majority rule in *Keen* will perpetuate the same type of litigation that Keen has had to endure. That will be the only way in which a plan administrator would know for certain who to pay.

That is exactly why the text of ERISA mandates the payment to the designated beneficiary. That is why this Court holds that there is no federal common law to create a waiver exception not found in the text of ERISA.

D. The Majority Rule in *Keen* Conflicts with the Anti-Alienation Text of ERISA:

The majority rule in *Keen* compounds the prior conflicts by further conflicting with the core anti-alienation text of ERISA. This rule impermissibly tries to re-write the text of ERISA.

The above cited relevant text of ERISA seeks and yields nationally uniform plan administration. *Egelhoff*, 532 U.S. at 142-152. This Court assiduously protects ERISA's salutary purpose. *Id.*

As a result and as stated above, plan administrators have the rules that govern the payment duty. As a further result and as stated above, Congress has mandated that the rules be applied to plan documents with limited exceptions. These rules are for the benefit of participants and beneficiaries. *Shaw v. Delta Air Lines, Inc.* 463 U.S. 86, 90 (1983).

ERISA § 1056(d)(1) is one of those rules. It prohibits the alienation or assignment of plan benefits except as allowed under ERISA § 1056(d)(3)(A). The anti-alienation provisions are designed to provide a dependable stream of income for participants and their heirs or dependents. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990).

The scope of the anti-alienation provision is broad and pervasive. The anti-alienation provision has prevented the use of an equitable constructive trust to seize pension plan benefits for repayment of amounts embezzled by a former union official. *Guidry*, 493 U.S. 365, 371-72. The anti-alienation provision also trumps ordinary bankruptcy rules and prevents individual pension plan interests from becoming assets of the bankruptcy estate subject to the claims of creditors. *Patterson v. Shumate*, 504 U.S. 753, 760 (1992).

ERISA further prohibits the alienation of benefits through the use of a domestic relations order; instead, the order to be recognized must be a "qualified domestic relations order." ERISA § 1056(d)(3)(A), *Boggs*, 520 U.S. at 848. ERISA preempts all other attempts to use state domestic relations law to override ERISA plan beneficiary designations. *Id.*

In the teeth of the comprehensive nature of ERISA, of its anti-alienation language and of its limited statutory exceptions, the majority tries to find a permissible gap that erodes the anti-alienation provisions. The majority's rule of waiver requires that a plan administrator must disregard the provisions of ERISA §1056 and to make beneficiary determinations in a manner contrary to the framework of the statute. Thus a plan administrator is forced to make an assignment or alienation of pension plan benefits in a way that is incompatible with ERISA's anti-alienation provision.

Plans may not give effect to an alienation not authorized by an express ERISA exception, whether purportedly imposed by state law or by some "generalized equitable exception." *Guidry*, 493 U.S. at 376; *see also Patterson*, 504 U.S. at 760. Yet giving effect to the common law rule does exactly that.

While revision of ERISA is not exactly the same thing as just ignoring the existing language of the statute in order to find a gap, as applied to this dispute, there is no substantive distinction. The Court in *Mertens* used essentially the same analytical approach as it used in *Egelhoff* to find that the federal common law in *Mertens* could not exist in the face of the specific language of ERISA. *Mertens*, 508 U.S. 248.

The Secretary of Labor in its amicus brief before the Texas Supreme Court concludes, "[b]ecause ERISA itself provides the applicable rules governing payments to beneficiaries, the . . . recognition of [a] federal common law is misguided; ERISA simply leaves no room for a judge-made creation of additional special ERISA rules in derogation of existing rules expressly provided by the statute" (relying in part on *McMillan v. Parrott*, 913 F.2d 310, 310-312 (6th Cir.

1990)). The Secretary of Labor advocates the holding of *Egelhoff* that all but forecloses any resort to federal common law in this context and instead strongly bolsters what the language of ERISA provides: plan administrators are to follow plan documents to determine beneficiary status under any ERISA-governed plan.

II. THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE HOLDINGS IN THE CASE LAW (INCLUDING DECISIONS OF THIS COURT) THAT "STRICTLY FOLLOW" THE TEXT OF ERISA AND THE HOLDINGS IN THE "VARIABLE COMMON LAW" CASE LAW THAT SEEK TO MODIFY THE TEXT OF ERISA SUCH THAT THE OBLIGATIONS OF PLAN ADMINISTRATORS VARY FROM JURISDICTION TO JURISDICTION IN LIEU OF THE UNIFORM NATIONAL STANDARD THAT ERISA REQUIRES.

Egelhoff resolves the conflict between the case law, such as *Egelhoff* and *McMillan,* that strictly follows the text of ERISA, and case law, such as *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990) and *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78 (4th Cir. 1996), that alters the text of ERISA through an alleged federal common law or similar improper approach. Unfortunately, the resolving influence of *Egelhoff* has been ignored. The Court should grant this petition to review this case, to reverse the Texas Supreme Court's decision in *Keen* and to resolve this conflict once and for all.

Since *Egelhoff*, there have been a series of decisions that, for all apparent purposes, gives little weight or significance

to *Egelhoff* (e.g. *Keen, Silber v. Silber*, 99 N.Y.2d 395 (N.Y. App. 2003), and *Melton v. Melton*, 324 F.2d 941 (7th Cir. 2003)). These decisions attempt to revive or to rely on the reasoning in decisions such as *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *Fox Valley*, 897 F.2d 275, *Lyman Lbr. Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989), and *Brandon v. Travelers Ins. Co.*, 18 F.2d 1321 (5th Cir. 1994). All of the cases following *Egelhoff* recognize the existence of *Egelhoff* but none appear to be willing to give it its due or to recognize the significance of *McMillan*, 913 F.2d 310.

It cannot be doubted that *Egelhoff* intends to correct the decisions, other than *McMillan*, that have deviated from *ERISA's* framework and to re-establish the anchor of ERISA's unambiguous text. However, the failure of the post-*Egelhoff* cases to recognize its significance and to properly analyze the effect of ERISA § 1104(a)(1)(D) has resurrected the problem identified and addressed by *Egelhoff*. This conflict arising so soon after *Egelhoff* and the aggressive deviation from the path established in that case is highly indicative of the need to grant the writ of certiorari sought herein.

CONCLUSION

Petitioner Patsy Keen requests that, for the reasons stated in her petition, the petition be granted and thereafter that this Court reverse the decision of the Texas Supreme Court and confirm her entitlement to the plan benefits in question.

Respectfully submitted,

MAURICE BRESENHAN, JR.
Counsel of Record
PASCAL PAUL PIAZZA
CYNTHIA KEEN PERLMAN
ZUKOWSKI & BRESENHAN, L.L.P.
1177 West Loop South, Suite 1100
Houston, Texas 77027
(713) 965-9969

Attorneys for Petitioner

APPENDIX A — OPINION OF THE SUPREME COURT OF TEXAS DATED JUNE 19, 2003

OPINIONS OF THE SUPREME COURT OF TEXAS

No. 01-0447

PATSY KEEN

vs.

DIANA WEAVER, INDEPENDENT EXTRX.

OPINION

* * *

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, JUSTICE SCHNEIDER and JUSTICE SMITH joined.

JUSTICE HECHT filed a dissenting opinion in which JUSTICE OWEN, JUSTICE JEFFERSON and JUSTICE WAINWRIGHT joined.

In this case, an ERISA pension plan participant designated his wife as the plan's primary beneficiary. The couple later divorced and, in an agreement incorporated in the divorce decree, the former wife waived any interest in the plan, agreeing that it would be the participant's sole property. When the participant died some thirteen years later without changing his beneficiary designation, the former wife and the participant's alternative beneficiary lodged competing claims to the plan proceeds. We must decide whether ERISA precludes a pension plan beneficiary from waiving an interest in the plan. We conclude that it does not, and hold that the former wife's waiver is effective. Accordingly, we affirm the court of appeals' judgment.

Appendix A

I

Frank Weaver and Patsy Keen married in 1967. During the marriage, Frank purchased two annuity plans as part of his employee benefits—a Teacher's Insurance and Annuity Association Contract and a College Retirement Equities Fund (TIAA-CREF). It is undisputed that these annuity plans are "employee pension benefit plans," as defined by the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1002(2)(A). Frank named Patsy as the plans' primary beneficiary and his mother, Rita Weaver, as the contingent beneficiary. Frank and Patsy divorced in 1982. The divorce decree incorporated an agreement incident to divorce that divided the couple's estate and awarded Frank the TIAA-CREF plans as his sole and separate property. Frank never changed the plans' primary beneficiary designations.

Frank married Diana Weaver in 1983, and they remained married until Frank's death in 1995. Relying on the beneficiary designation in the plan documents, the plan administrators paid part of the death benefits to Patsy. Rita Weaver, as the contingent beneficiary, sued Patsy and TIAA-CREF for breach of contract, conversion, and unjust enrichment, claiming that she was entitled to the annuity proceeds because Patsy had waived entitlement to the benefits in the divorce decree. Rita died while the suit was pending, and Diana Weaver, as independent executrix of Frank's and Rita's estates, continued the suit. TIAA-CREF interpleaded the remaining benefits and obtained an order absolving them from any further liability on the plans other than to pay the benefits according to the final judgment. Patsy counterclaimed, asserting entitlement to the proceeds as the designated beneficiary.

After a bench trial, the district court held that Patsy was entitled to the plan proceeds. The court of appeals reversed, however, holding that the Texas "redesignation statute," although preempted by ERISA, applied as federal common law to revoke Patsy's beneficiary designation after divorce and redesignate Rita Weaver as the plan beneficiary. 43 S.W.3d 537, 544. This holding comports with the court of appeals' decision in *Emmens v. Johnson,* 923 S.W.2d 705, 707-08 (Tex.App.—Houston [1st Dist.] 1996, writ denied), but conflicts with *Heggy v. Am. Trading Employee Ret. Account Plan,* 56 S.W.3d 280, 283-85 (Tex.App.—Houston [14th Dist.] 2001, no pet.). Those courts, and the court of appeals here, all agree that ERISA preempts the Texas redesignation statute, but they disagree on what happens given ERISA preemption. Like the court of appeals in this case, the Emmens court adopted the Texas redesignation statute as federal common law and held that a divorce automatically revokes a former spouse's beneficiary designation. *Emmens,* 923 S.W.2d at 712. In *Heggy,* on the other hand, the court held that ERISA requires the plan documents to control regardless of the circumstances and precludes a former spouse's contractual waiver of plan proceeds. *Heggy,* 56 S.W.3d at 283-85. We granted Patsy's petition for review to resolve this conflict among our courts of appeals.

II

Section 9.302 of the Texas Family Code, known as the "redesignation statute," provides that the designation of a spouse as a retirement account beneficiary is rendered ineffective by a subsequent divorce. TEXAS FAM. CODE

§ 9.302(a).[1] If the statute applied here, it would operate to award Rita's estate the plan proceeds as the alternate beneficiary. *Id.* § 9.302(b). But the court of appeals held, and the parties acknowledge, that ERISA preempts the redesignation statute. *See* 43 S.W.3d at 541. We agree.

ERISA's preemption section states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). A state law "relates to" an ERISA plan "if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). The United States Supreme Court recently held that ERISA expressly preempted a Washington statute similar to our redesignation statute. *Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001). The Court held that the statute had an impermissible connection to ERISA plans for two reasons. First, the statute governed plan administrators' benefit payments and thus "implicate[d] an area of core ERISA concern." *Id.* at 147. Second, statutes differ among the various states and thus interfere "with nationally uniform plan administration." *Id.* at 148. For these same reasons, ERISA expressly preempts the Texas statute's application to determine plan beneficiaries. *See Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) ("Almost every circuit court to consider the issue . . . has determined that a state law governing the designation of an ERISA beneficiary 'relates to' the ERISA plan, and is therefore preempted.").

---

1. There are exceptions to this rule, such as the post-divorce redesignation of the former spouse as beneficiary or the designation of the former spouse as beneficiary in the divorce decree. *Id.* None of the exceptions are relevant here.

Appendix A

III

Deciding that ERISA preempts the Texas redesignation statute, however, only raises a harder question. As the Fifth Circuit noted in *Manning*, "[t]he more difficult issue is whether, having established that the state law is preempted, the federal law governing the resolution of this and similar cases may be reasonably drawn from the text of ERISA itself, or must instead be developed as a matter of federal common law." *Manning*, 212 F.3d at 870. Federal common law is a "'necessary expedient'" that courts resort to when "compelled to consider federal questions 'which cannot be answered from federal statutes alone.'" *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (citations omitted). Thus, the threshold inquiry is whether ERISA's text explicitly resolves the question before us.

Patsy argues that sections 1002(8) and 1104(a)(1)(D) of ERISA mandate the payment of plan proceeds to her, despite her unequivocal agreement in the divorce decree to relinquish her interest in them. Section 1002(8) defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). Section 1104, which delineates the fiduciary responsibilities that ERISA plan administrators owe to plan participants and beneficiaries, requires administrators to discharge their duties "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). According to Patsy, these provisions prohibit plan administrators from looking beyond the plan documents and require them to distribute benefits to designated beneficiaries

regardless of the circumstances. In Patsy's view, ERISA prevents the plans' administrator from giving her waiver of plan benefits any force or effect.

While Patsy's interpretation is simple and easy to apply, we do not believe that ERISA's text prohibits a plan administrator from recognizing a beneficiary's waiver, disclaimer, or other repudiation of plan benefits. First, other provisions of ERISA require plan administrators to look beyond beneficiary designations in plan documents to determine entitlement to plan benefits. For example, while ERISA generally prohibits a participant's assignment or alienation of pension benefits, since 1984 ERISA has provided a limited exception if the benefits are the subject of a qualified domestic relations order (QDRO). *See* 29 U.S.C. § 1056(d)(3)(A).[2] A plan administrator presented with a QDRO that satisfies ERISA's fairly detailed requirements must pay an alternate payee designated in the QDRO rather than the beneficiary designated in plan documents. *Boggs v. Boggs,* 520 U.S. 833, 846-47 (1997). And a spouse who is a designated beneficiary of a joint and survivor annuity may waive entitlement to those benefits under certain circumstances. 29 U.S.C. § 1055(c)(1)(A). Furthermore, the Supreme Court has recognized that ERISA welfare plan benefits may be garnished under state procedures. *See Mackey v. Lanier Collection Agency & Serv. Inc.,* 486 U.S. 825, 841 (1988).

---

2. Frank and Patsy's divorce decree was signed before the QDRO provision was effective. The parties do not argue, and we do not consider, whether or not the decree would satisfy the requirements for a QDRO.

In addition, the Supreme Court has directed courts to look to common-law principles and trust law when interpreting ERISA's fiduciary duty provisions. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989); *see also Varity Corp. v. Howe,* 516 U.S. 489, 497 (1996) (noting that the common law is not just an aid for interpreting ERISA's fiduciary duties, but is even "a starting point"). This is precisely what the majority of circuit courts that have considered the issue have done, holding that federal common law governs disputes between a designated former spouse beneficiary and other claimants to ERISA plan proceeds. *See Manning,* 212 F.3d at 870-72; *Clift v. Clift,* 210 F.3d 268 (5th Cir. 2000); *Rhoades v. Casey,* 196 F.3d 592, 598-99 (5th Cir. 1999), *cert. denied,* 531 U.S. 924 (2000); *Hill v. AT & T Corp.,* 125 F.3d 646, 648 (8th Cir. 1997); *Estate of Altobelli v. Int'l Bus. Machines Corp.,* 77 F.3d 78, 81-82 (4th Cir. 1996); *Mohamed v. Kerr,* 53 F.3d 911, 914 (8th Cir. 1995), *cert. denied,* 516 U.S. 868 (1995); *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321, 1325-27 (5th Cir. 1994), *cert. denied,* 513 U.S. 1081 (1995); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275, 280 (7th Cir. 1990) (en banc), *cert. denied,* 498 U.S. 820 (1990); *Lyman Lumber Co. v. Hill,* 877 F.2d 692, 693-94 (8th Cir. 1989); *see also Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003) (noting, in post-*Egelhoff* decision, that "ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary of such a plan").[3] These courts have relied upon common-law principles to conclude that the named beneficiary waived entitlement to plan benefits. Only the Sixth Circuit has

3. All of these cases were decided after the 1984 amendment to ERISA that the dissent believes "undercuts" the rationale for looking to federal common law. __ S.W.3d __ (Hecht, J., dissenting).

unambiguously taken the minority view, that ERISA section 1104(a)(1)(D) expressly requires that plan benefits be paid to the designated beneficiary regardless of the circumstances and precludes the application of federal common law. *See McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990); *see also Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415, 421 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126, 130 (6th Cir. 1996); *cf. Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2d Cir. 1993) (holding that, although ERISA was "silent on the matter," state law was preempted and "the cause of uniform administration" would not be served if state law were adopted as federal common law).

We do not believe that *Egelhoff* precludes the application of federal common law to this dispute. There, the Supreme Court expressed concern that applying individual state redesignation statutes would require plan administrators to resolve complex choice-of-law issues and become familiar with multiple state statutes in order to determine the appropriate beneficiary, thus "interfering with nationally uniform plan administration." *Egelhoff*, 532 U.S. at 148-49. In contrast, applying federal common law promotes national uniformity. *Fox Valley*, 897 F.2d at 281-82. The Court in *Egelhoff* did note that the state statute impermissibly interfered with plan administration by requiring administrators to look beyond plan documents to determine matters of payment. *Id.* at 147-48. But the Court also indicated that applying a more uniform body of law might not present an equivalent hurdle. The Court strongly suggested that state "slayer statutes," or common law based

on the principles underlying those statutes, might present a different issue:

> In the ERISA context, these "slayer" statutes could revoke the beneficiary status of someone who murdered a plan participant. Those statutes are not before us, so we do not decide the issue. We note, however, that the principle underlying the statutes—which have been adopted by nearly every State—is well established in the law and has a long historical pedigree predating ERISA. And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.

Id. at 152 (citation omitted).[4]

Our decision in *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001), is consistent with this approach. There, the surviving spouse's claims depended on her community property rights. *Id.* at 112. Because most states are not community property states, a plurality of this Court believed that our community property laws do not lend themselves

---

4. A federal district court has recently held that *Egelhoff* did not change the Fifth Circuit's adoption of the federal common law rule, enunciated in *Brandon*, that recognizes the waiver of ERISA plan benefits. *Metropolitan Life Ins. Co. v. Palmer*, 238 F. Supp. 2d 821, 824-26 (E.D.Tex. 2002). And at least one court following *Egelhoff* has also held that a murderer should not be permitted to receive benefits from a victim's plan, either under a state slayer statute or under federal common law. *See Admin. Comm. for the H.E.B. Inv. and Ret. Plan v. Harris*, 217 F. Supp. 759, 761-62 (E.D.Tex. 2002).

"to the application of uniform federal common law" and thus interfere with uniform ERISA plan administration. *Id.* at 126. The plurality recognized, though, that "Congress 'intended that the courts would "develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"'" *Id.* at 122 (quoting *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989))). The question is how that federal common law should be developed.

In this case, the court of appeals held that ERISA preempted our state redesignation statute, but nonetheless applied that statute's express terms as federal common law. 43 S.W.3d at 544. The court reaffirmed its analysis in a subsequent opinion denying rehearing after the Supreme Court issued *Egelhoff*, stating that "our conclusion that federal law controls is supported by *Egelhoff*." 43 S.W.3d at 544-46. We agree that *Egelhoff* supports the conclusion that federal common law controls, but disagree with the court of appeals' formulation of federal law as a mere conduit for applying individual state statutes. Such an approach presents the same obstacles to national uniformity that ERISA preemption was designed to prevent, requiring plan administrators to determine complex choice-of-law questions, and then to interpret and apply varying state laws. This approach also differs significantly from the one that the majority of federal circuit courts have applied in deciding this issue. While those courts have sometimes looked to state statutes governing the disposition of marital property to inform the analysis, they have gone beyond the statutes to develop a body of common law that recognizes a former spouse's waiver of ERISA plan benefits in a divorce decree

dividing the marital estate so long as it is specific, knowing, and voluntary. *See, e.g., Brandon,* 18 F.3d at 1326 (adopting presumption of waiver in Texas statute as federal common law, modified to require that a "waiver be voluntary and in good faith"); *Fox Valley,* 897 F.2d at 280-81 (looking to Illinois statute and to law of other states in determining that federal common law gives effect to a specific waiver); *Lyman Lumber,* 877 F.2d at 693 (applying the principle, derived from various circuit court and state court opinions, that a former spouse's beneficiary interest is extinguished if it is specifically waived). The federal courts' formulation of common law in this area, which ERISA's text does not address, does not interfere with nationally uniform plan administration, and we apply it here.

Patsy argues that ERISA's anti-alienation provision precludes giving effect to her waiver. Under that provision, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). But the circuit courts that have specifically addressed this issue have agreed that this provision applies to the plan participant and "does not apply to a beneficiary's waiver." *Altobelli,* 77 F.3d at 81; *Fox Valley,* 897 F.2d at 280; *cf. Lyman Lumber,* 877 F.2d at 693-94 (holding, without addressing the anti-alienation provision, that ex-spouse can waive pension benefits in a divorce decree). These courts have reasoned that the anti-alienation provision is "a spendthrift device intended to ensure that employees' accrued benefits are available for retirement." *Altobelli,* 77 F.3d at 81. The provision is intended "'to safeguard a stream of income for pensioners (and their dependents),'" not to bar a waiver in the pensioner's favor. *Id.* (quoting

Appendix A

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990)); *see also* H.R. Rep. No. 807, 93d Cong., 2d Sess. 67-68 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4734; *Fox Valley,* 897 F.2d at 279. We do not believe that applying the federal common law of waiver implicates or interferes with ERISA's anti-alienation provision. To the extent that *Heggy* conflicts with this opinion, we disapprove it.

IV

In this case, Patsy does not contend that her waiver of plan benefits was not knowing and voluntary. During the divorce, Patsy, but not Frank, was represented by counsel, and it was her attorney who drafted the agreement. The waiver was also specific and clear:

> Section 3
> DIVISION OF ASSETS
>
> . . .
>
> 3.02 *Property of Husband.* The parties agree that Husband shall own, possess, enjoy, free from any claim of Wife, the property listed in Schedule 2 of this agreement. Wife hereby grants, conveys, and assigns to Husband all such property. . . .

Appendix A

Section 4
DIVISION OF EMPLOYEE BENEFITS

. . .

4.02 *Community Ownership.* Husband has earned certain employee benefits arising out of present and past employment and the parties agree that Husband shall own all of said pension, profit sharing, retirement and deferred compensation benefits of all kinds resulting from his present and past employment as his sole and separate property, without any claim thereto by Wife. . . .

Schedule 2

. . .

(6) All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, pension plan, or like benefit program existing by reason of Husband's past, present, or future employment, including but not limited to:

. . .

(b) The Teachers' Insurance and Annuity Association — College Retirement Equities Fund.

This agreement clearly contemplates not only a division of the specific retirement plans into separate property, but

also a waiver of all Patsy's interest in the plans. If the agreement were limited to Section 4.02, it might not be sufficient to waive Patsy's beneficiary interest. *See Manning,* 212 F.3d at 876 (eschewing a "mechanistic formula," but noting that "language explicitly divesting a former spouse of an interest in any and all employee benefit plans of the other is probably sufficient"); *compare Altobelli,* 77 F.3d at 80 (holding that language that "Wife hereby waives and transfers to the Husband any interest that she may have" created a valid waiver of interest in ERISA benefits), *and Fox Valley,* 897 F.2d at 277 (holding that language that "[t]he parties each waive any interest or claim in and to any . . . plans" created a valid waiver of interest in ERISA plan), *with Lyman Lumber,* 877 F.2d at 693-94 (holding that decree that husband "shall have as his own, free of any interest of [wife], his interest in the . . . plan" gave husband his own interest in the plan but did not "specifically refer to and modify" the wife's beneficiary interest). But Section 3.02 and Schedule 2 leave no room for doubt that Patsy intended to relinquish all interests she might have in Frank's ERISA plans, including her interest as beneficiary.

V

We hold that Patsy's waiver of her interest in Frank's ERISA plans was specific, knowing, and voluntary, and thus enforceable under federal common law. Accordingly, we affirm the court of appeals' judgment, although on different grounds.

HARRIET O'NEILL
Justice

OPINION DELIVERED: June 19, 2003

Appendix A

DISSENTING OPINION

JUSTICE HECHT, joined by JUSTICE OWEN, JUSTICE JEFFERSON, and JUSTICE WAINWRIGHT, dissenting.

The federal Employment Retirement Income Security Act of 1974 states that an employee benefit plan is to be administered "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [the statute]."[1] Both pension plans in this case provided:

> The Beneficiary is as designated by the [Annuitant/Participant] in the application, provided that such designation is in form and wording satisfactory to [the plan provider]. . . .
>
> The [Annuitant/Participant] may designate or change the Beneficiary by giving written notice to [the plan provider] at its home office in form and wording satisfactory to [the plan provider]. . . .

The plans make no provision for a beneficiary's waiver of benefits. These terms are consistent with ERISA's definition of a beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."[2] It should follow,

1. 29 U.S.C. § 1104(a)(1)(D); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 n.4 (2001) (quoting statute).

2. 29 U.S.C. § 1002(8); *see also Egelhoff*, 532 U.S. at 147 (quoting statute).

therefore, that ERISA requires pension plans to be administered so that the beneficiary is the person designated by the participant in writing to the plan provider unless it would be inconsistent with other ERISA provisions[3] or the aims of the statute to do so. State law—a divorce decree, a statute, or any other law—that would alter this requirement is preempted, as the United States Supreme Court recently held in *Egelhoff v. Egelhoff*,[4] and as we recognized in *Barnett v. Barnett*.[5] Thus, Frank Weaver's designation of his then-wife Patsy Keen could not be changed by Texas law based on their decree of divorce, their agreement incident to divorce, or section 9.302 of the Family Code that invalidates, with certain exceptions, pre-divorce designations of beneficiaries of retirement plans.[6]

---

3. *See, e.g.*, 29 U.S.C. § 1055(c) (not applicable here, under the effective dates and transitional rules provided in secs. 302 and 303 of the Retirement Equity Act (REA) of 1984, Pub.L. No. 98-397, 98 Stat. 1426 (1984) (codified as a historical note to 29 U.S.C. § 1001 (1985))).

4. 532 U.S. 141 (2001).

5. 67 S.W.3d 107 (Tex.2001).

6. TEX. FAM. CODE § 9.302 ("Pre-Decree Designation of Ex-Spouse as Beneficiary in Retirement Benefits and Other Financial Plans"):

> "(a) If a decree of divorce or annulment is rendered after a spouse, acting in the capacity of a participant, annuitant, or account holder, has designated the other spouse as a beneficiary under an individual retirement

(Cont'd)

Appendix A

(Cont'd)

account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant in force at the time of rendition, the designating provision in the plan in favor of the other former spouse is not effective unless:

(1) the decree designates the other former spouse as the beneficiary;

(2) the designating former spouse redesignates the other former spouse as the beneficiary after rendition of the decree; or

(3) the other former spouse is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent of either former spouse.

"(b) If a designation is not effective under Subsection (a), the benefits or proceeds are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the designating former spouse.

"(c) A business entity, employer, pension trust, insurer, financial institution, or other person obligated to pay retirement benefits or proceeds of a financial plan covered by this section who pays the benefits or proceeds to the beneficiary under a designation of the other former spouse that is not effective under Subsection (a) is liable for payment of the benefits or proceeds to the person provided by Subsection (b) only if:

(Cont'd)

Instead of this construction of ERISA, which the Court admits is "simple and easy to apply,"[7] the Court opts for one that is not only more complicated and harder to apply, but one that cannot be squared with the statutory text, at least as we have been given to understand it by *Egelhoff*. In the face of the United States Supreme Court's holding that ERISA preempts a state statute from altering the payment of plan benefits (with the possible exception of "slayer" statutes which prevent murderers from profiting by their crimes, consistent with the ancient equitable maxim that no one is

(Cont'd)

> (1) before payment of the benefits or proceeds to the designated beneficiary, the payor receives written notice at the home office or principal office of the payor from an interested person that the designation of the beneficiary or fiduciary is not effective under Subsection (a); and
>
> (2) the payor has not interpleaded the benefits or proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.
>
> "(d) This section does not affect the right of a former spouse to assert an ownership interest in an undivided pension, retirement, annuity, or other financial plan described by this section as provided by this subchapter.
>
> "(e) This section does not apply to the disposition of a beneficial interest in a retirement benefit or other financial plan of a public retirement system as defined by Section 802.001, Government Code."

7. *Ante* at __.

permitted to profit from his own wrong),[8] this Court simply circumvents preemption by allowing state law to be reincarnated as federal common law. The result is the same, practically speaking, as if state law were not preempted at all. The obvious weakness in this position is that the Court is unable to supply any reason, real or imagined, why ERISA would explicitly require plans to be administered according to their terms, preempt state law to assure that end, and then reincorporate state law into federal common law so that plans are not administered according to their terms, thereby making the express statutory language simply illusory. Ignoring this fundamental flaw in its position, the Court instead offers two arguments in support.

The first is that ERISA itself contains exceptions to the rule that plans be administered according to their terms. For example, a 1984 amendment to ERISA allows a change in beneficiary to be made by a qualified domestic relations order.[9] ERISA, in other provisions added by the 1984 amendments, also allows a spouse to waive a mandated joint and survivor annuity in certain circumstances.[10] The Court appears to take the existence of these two express exceptions as an indication that there should be others. I confess the Court's logic eludes me here. Surely the creation of a narrow exception for QDROs suggests fairly strongly: this and

8. *Egelhoff*, 532 U.S. at 150, 152.

9. 29 U.S.C. § 1056(d)(3)(A), enacted in REA of 1984, Pub.L. No. 98-397, sec. 104(a), 98 Stat. 1426, 1433.

10. *Id.* § 1055(c)(1)(A), (g), and (k); REA of 1984, Pub.L. No. 98-397, sec. 103(a), 98 Stat. 1426, 1430.

nothing else. It is true that the 1984 amendment allowed a plan administrator discretion to treat a divorce decree prior to the amendment's effective date as a QDRO,[11] but this too suggests that the divorce decree cannot be given effect absent the plan administrator's exercise of discretion. Weaver does not argue in this case that the plan administrator elected or should have elected to treat Keen's divorce decree as a QDRO. If a plan beneficiary could be changed by any divorce decree without limitation, a statute allowing changes by divorce decrees only in specified circumstances would have no purpose. It seems plain to me that the 1984 amendment severely undercuts the Court's position.[12] The same is true of the waiver provision. If ERISA allows benefits to be waived without regard to plan terms, then a provision that also allows waivers in only some circumstances is pointless. An express recognition of certain waivers indicates that others are not permitted. The Court observes that welfare

---

11. *See Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606 (5th Cir. 1999) (noting that a court reviews a plan administrator's statutory and legal conclusions de novo).

12. *See Boggs v. Boggs*, 520 U.S. 833, 850 (1997) (reviewing cases including *In re Marriage of Campa*, 152 Cal. Rptr. 362 (1979), *dismissed for want of a substantial federal question*, 444 U.S. 1028 (1980), and concluding that: "[w]hether or not this [pre-REA federal common-law] extension of the definition of 'beneficiary' was consistent with the statute then in force, these authorities are not applicable in light of the REA amendments. The QDRO and the surviving spouse annuity provisions define the scope of a non-participant spouse's community property interests in pension plans consistent with ERISA.").

plan benefits may be garnished.[13] But garnishment is premised on the debtor's being the beneficiary under the plan; otherwise, there is nothing to garnish. Why the Court thinks garnishment has any bearing on whether a plan beneficiary can be changed other than in accordance with the plan's terms is not clear.

The Court's second argument is that the Supreme Court has directed courts to look to federal common law in applying ERISA, and four federal circuits—the Fourth,[14] Fifth,[15] Seventh,[16] and Eighth[17]— have done so in determining

---

13. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 841 (1988).

14. *Estate of Altobelli v. Int'l Bus. Mach. Corp.*, 77 F.3d 78 (4th Cir.1996).

15. *Clift v. Clift*, 210 F.3d 268, 269-272 (5th Cir.2000) (addressing a divorce decree waiving "[a]ny and all policies of life insurance" and citing *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994)).

16. *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir.1990) (en banc), *cert. denied*, 498 U.S. 820 (1990), *distinguished in Melton v. Melton*, 324 F.3d 941, 946 (7th Cir. 2003) (no waiver under a divorce agreement that, although it contained a blanket revocation of the parties' "interests in all financial and property rights arising 'by reason of their marital relation' and in 'any asset assigned to a party by this Agreement' . . . including 'annuities, life insurance policies,' and other kinds of financial instruments", did not expressly identify husband's ERISA-regulated employee group term life insurance or mention employment-related benefits).

17. *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693-694 (8th Cir.1989) (divorce decree stating that plan participant "'shall have

(Cont'd)

whether a designated beneficiary has waived benefits. But the Supreme Court has allowed recourse to federal common law only in "'areas where ERISA has nothing to say'".[18] According to *Egelhoff,* ERISA has something to say about benefits payments: in the Supreme Court's words, ERISA expressly "governs the payment of benefits, a central matter of plan administration."[19] Of the four circuits that have used federal common law to find a waiver of benefits, only one has reiterated that view since *Egelhoff,*[20] and it did not consider whether *Egelhoff* permits a federal common law of waiver under ERISA. No circuit has retreated from its view, but the point is that the cases on which the Court relies largely have not had to consider *Egelhoff.* The Sixth Circuit[21] has refused to apply federal common law to find a waiver of benefits, and the Secretary of Labor has filed an amicus curiae

---

(Cont'd)
as his own, free of any interest of [ex-wife], his interest in the profit-sharing plan of his employer'" did not divest ex-wife of her beneficiary interest in the plan; the decree gave the participant his entire interest in the plan free of any interest of ex-wife, but did not specifically refer to or modify ex-wife's beneficiary interest).

18. *Egelhoff,* 532 U.S. at 14 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 330 (1997)).

19. *Egelhoff,* 532 U.S. at 148.

20. *Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003).

21. *Metropolitan Life Ins. Co. v. Pressley,* 82 F.3d 126 (6th Cir.1996); *McMillan v. Parrott,* 913 F.2d 310 (6th Cir.1990).

brief in this case arguing that such use of federal common law is inconsistent with *Egelhoff.*

The Secretary makes a compelling case. In *Egelhoff,* the Supreme Court stated that a state statute that requires a plan administrator to pay benefits to beneficiaries other than "those identified in the plan documents . . . implicates an area of core ERISA concern":[22]

> In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," [29 U.S.C.] § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," [29 U.S.C.] § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." [29 U.S.C.] § 1002(8). In other words, unlike generally applicable laws regulating "areas where ERISA has nothing to say," [*Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 519 U.S. 316, 330 (1997)], which we have upheld notwithstanding their incidental effect on ERISA plans, see, *e.g. ibid.,* this statute governs the payment of benefits, a central matter of plan administration.[23]

---

22. *Egelhoff,* 532 U.S. at 142.

23. 532 U.S. at 147-148.

Furthermore, the Supreme Court stated, "[o]ne of the principal goals of ERISA is to enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.'"[24] While application of some federal common law does not theoretically threaten uniform plan administration in the same way fifty states' laws would, as a practical matter uniformity is impaired by the differences in federal common law in the circuits due to the way in which it is derived—by reference to states' laws.

While acknowledging the legitimacy of the Secretary's concerns, the Court is unable to identify a coherent federal common law of waiver. From two cases the Court concludes that a waiver must be specific,[25] but they say nothing about a requirement that a waiver be made in good faith, an additional element the Court finds in another case.[26] Moreover, the Court concludes that a waiver must be voluntary. Thus, ERISA precludes stripping one spouse of any interest in the other's pension plan in a contested divorce but not in an agreed divorce. It is not apparent why the result should be dependent on whether the divorce decree was agreed.

---

24. 532 U.S. at 148 (quoting *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 9 (1987)).

25. *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275, 281 (7th Cir.1990) (en banc), *cert. denied,* 498 U.S. 820 (1990); *Lyman Lumber Co. v. Hill,* 877 F.2d 692, 693 (8th Cir. 1989).

26. *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321, 1326 (5th Cir. 1994).

Finally, the Court's position is at odds with our holding last year in *Barnett* that the federal common law does not include a remedy for fraud on a community estate. Why is there a federal common law of waiver but not of fraud? The Court offers no answer.

Frank Weaver was free to change the beneficiaries of his pension plans at any time, provided only that the designations be in writing and in a form suitable to the plan providers. He may not have removed Keen as beneficiary because he thought the divorce decree had accomplished that, or he may have decided to leave her as beneficiary notwithstanding the divorce decree, or he may not have thought about the matter at all. Rather than put plan administrators to the task of attempting to resolve these virtually inevitable uncertainties about deceased participants' intentions, ERISA provides a general rule that is "simple and easy to apply" for participants, beneficiaries, and plan administrators alike: look to the beneficiary designation, except in very specific cases.

For these reasons, I would hold, as urged by the Secretary of Labor, that the pension plan benefits in this case be paid to the beneficiary designated in accordance with the terms of the plan.

NATHAN L. HECHT
Justice

OPINION DELIVERED: June 19, 2003

APPENDIX B — OPINION AND ORDER OF THE COURT OF APPEALS OF TEXAS, WACO DATED APRIL 18, 2001

COURT OF APPEALS OF TEXAS, WACO

No. 10-99-305-CV.

Diana WEAVER, Independent Executrix of the Estate of Francis J. Weaver and Rita Marie Wilson Weaver,

Appellants,

v.

Patsy KEEN,

Appellee.

Jan. 10, 2001.
Opinion Overruling Rehearing
April 18, 2001.

* * *

Before Chief Justice DAVIS, Justice VANCE, and Justice GRAY.

Appendix B

OPINION

VANCE, Justice.

At issue is whether under federal law a former spouse, who was designated as the primary beneficiary of an ERISA[1]-qualified pension plan, is entitled to the proceeds under that plan. The former spouse argues that ERISA requires the administrator to follow the plan documents, *i.e.*, pay the designated beneficiary (the former spouse) despite an intervening divorce. The contingent beneficiary's estate argues that the Texas "redesignation statute," as applied through federal common law, prevents the former spouse from receiving such benefits. Because we agree with the contingent beneficiary's estate, we reverse the trial court's judgment and hold as a matter of law that the contingent beneficiary's estate is entitled to the proceeds of the pension plan. We remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Francis J. (Frank) Weaver and Patsy Keen were married in 1967. During a portion of their marriage, Frank was employed by Baylor College of Medicine. In 1972, Frank purchased two annuity contracts issued by Teacher's Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF). He named Patsy as the primary beneficiary of those annuity contracts. Baylor College of Medicine made contributions to the annuity contracts until 1980 when Frank terminated his employment. In 1982, Frank

1. Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § § 1001-1461 (West 1999 & Supp.2000).

and Patsy divorced. As part of the property settlement, Frank received the annuity contracts as his sole and separate property.

Frank married Diana in 1983. They were married for eleven and one-half years before his unexpected death in 1995. At the time of Frank's death, Patsy remained the beneficiary designated on Frank's TIAA-CREF annuity contracts. The plans' administrators, relying on this designation and the plan documents, paid part of the death-benefits to Patsy.

Frank's mother, Rita Weaver, the contingent beneficiary under each plan, died shortly after this lawsuit was filed. Diana, as the independent executrix of both Frank's and Rita's estates, continued this suit against Patsy and the plans' administrators to recover the proceeds of Frank's pension plans (annuity contracts). The plans' administrators interpleaded the remaining benefits and obtained an order absolving them from further liability on the plans, other than to pay the benefits according to a final judgment.

The suit was tried to the court. The primary issue was whether under federal law a former spouse designated as the primary beneficiary of an ERISA-qualified pension plan is entitled to the proceeds under that plan. The court found that Patsy was entitled to the benefits and awarded her attorney's fees. This appeal followed.

II. ARGUMENTS

Patsy argues that section 1104(a)(1)(D) of ERISA specifically controls. 29 U.S.C.A. § 1104(a)(1)(D) (West 1999). That section requires that a plan be administered

"in accordance with the documents and instruments governing the plan." *Id.* Accordingly, Patsy claims that the administrators were obligated to follow the plan documents and pay her as the named beneficiary despite her divorce. *See id.* Alternatively, Patsy claims that Frank's pension plan is governed by New York law, which dictates that the beneficiary designation controls. Patsy also argues that Diana lacks standing to seek the benefits.

Diana argues that Patsy specifically waived any claim to proceeds from the pension plans through her agreed settlement agreement and divorce decree. The agreement provided:

> Section 4
> *DIVISION OF EMPLOYEE BENEFITS*
>
> . . .
>
> 4.02 *Community Ownership.* Husband has earned certain employee benefits arising out of present and past employment and the parties agree that Husband shall own all of said pension, profit sharing, retirement and deferred compensation benefits of all kinds resulting from his present and past employment as his sole and separate property, without any claim thereto by Wife.[2]
>
> . . .

2. The agreement contains an identical provision divesting Frank of employee benefits related to Patsy's employment.

Appendix B

Schedule 2
PROPERTY TO HUSBAND

. . .

(6) All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, pension plan, or like benefit program existing by reason of Husband's past, present, or future employment, including but not limited to:

. . .

b) The Teachers' Insurance and Annuity Association-College Retirement Equities Fund.

Alternatively, Diana claims that by virtue of Patsy's and Frank's divorce, section 9.302 of the Texas Family Code,[3] as applied through federal common law, prevents Patsy from receiving such benefits. That section provides:

§ 9.302. Pre Decree Designation of Ex-Spouse as Beneficiary in Retirement Benefits and Other Financial Plans

(a) If a decree of divorce or annulment is rendered after a spouse, acting in the capacity of a

3. Sometimes referred to as the "redesignation statute."

participant, annuitant, or account holder, has designated the other spouse as a beneficiary under an individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant in force at the time of rendition, the designating provision in the plan in favor of the other former spouse is not effective unless:

(1) the decree designates the other former spouse as the beneficiary;

(2) the designating former spouse redesignates the other former spouse as the beneficiary after rendition of the decree; or

(3) the other former spouse is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent of either former spouse.

(b) If a designation is not effective under Subsection (a), the benefits or proceeds are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the designating former spouse.

tex. Fam.Code Ann. § 9.302(a), (b) (Vernon 1998).

Appendix B

III. STANDARD OF REVIEW

Whether under federal law a former spouse designated as the primary beneficiary of an ERISA-qualified pension plan is entitled to the proceeds under that plan is a question of law. *See Clift v. Clift,* 210 F.3d 268, 269-70 (5th Cir. 2000); *see Emmens v. Johnson,* 923 S.W.2d 705, 712 (Tex.App.—Houston [1st Dist.] 1996, writ denied). We apply a de novo standard of review to questions of law. *Lee v. Mitchell,* 23 S.W.3d 209, 212 (Tex.App.—Dallas 2000, pet. denied). A trial court's legal conclusion will be upheld on appeal unless it is erroneous as a matter of law. *Mack v. Landry,* 22 S.W.3d 524, 528 (Tex.App.—Houston [14th Dist.] 2000, no pet.).

IV. DISCUSSION

Initially, we address Patsy's standing argument. It is undisputed that the TIAA-CREF annuity contracts are "employee pension benefit plans," as defined by ERISA. 29 U.S.C.A. § 1002(2)(A) (West 1999). Frank Weaver designated Patsy as the primary beneficiary and his mother, Rita Weaver, as the contingent beneficiary of these contracts. Diana, as the independent executrix of Rita Weaver's estate, brought suit against Patsy and the two plans' administrators on grounds that the primary designation is no longer enforceable.

Under ERISA, the term "beneficiary" means a person designated by a participant, or by terms of an employee benefit plan, who is or may become entitled to a benefit thereunder. 29 U.S.C.A. § 1002(8). A beneficiary may bring

a cause of action "to recover benefits due to him under the terms of [the] plan." 29 U.S.C.A. § 1132(a)(1)(B) (West 1999). Because Rita's estate "may become entitled" to the pension benefits, if Patsy's designation is unenforceable, we find that Diana as the independent executrix of Rita's estate has standing. *Id.* § 1002(8); *see Emmens,* 923 S.W.2d at 706-07.

Congress passed ERISA in 1974 to establish a comprehensive federal scheme for the protection of participants and beneficiaries of employee benefit plans. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 44, 107 S. Ct. 1549, 1551, 95 L. Ed. 2d 39 (1987). ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a) (West 1999). A state law "relates to" an employee benefit plan when the law has "a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2900, 77 L. Ed. 2d 490 (1983).

There is no doubt that Diana's claims on behalf of the estate, to the extent that they rely directly upon the Texas redesignation statute, cannot be sustained because the Texas statute is preempted. Likewise, we reject Patsy's argument that Frank's pension plan is governed by New York law because it is also preempted. Almost every federal circuit court to consider the issue has determined that a state law governing the designation of an ERISA beneficiary "relates to" the ERISA plan, and is therefore preempted.[4] *Manning v. Hayes,* 212 F.3d 866, 870 (5th Cir. 1990).

---

4. *See also Metropolitan Life Ins. Co. v. Pettit,* 164 F.3d 857, 862 (4th Cir.1998); *Mohamed v. Kerr,* 53 F.3d 911, 913 (8th Cir.1995); (Cont'd)

Appendix B

Having established that state law is preempted, we must determine the applicable federal law which will govern the resolution of this dispute. *Id.* In making this determination, we "look to either the statutory language [of ERISA] or, finding no answer there, to federal common law which, if not clear, may draw guidance from analogous state law." *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994) There is presently a circuit split on this issue. *Manning*, 212 F.3d at 870.

A. The Minority Approach

Patsy contends that ERISA section 1104(d) expressly requires that plan benefits be paid directly to the designated beneficiary and, further, bars any inconsistent federal common law permitting a broader inquiry.

The Sixth Circuit is the only circuit to unambiguously employ this approach. *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415, 421 (6th Cir. 1997) (citing *McMillan v. Parrott*,

---

(Cont'd)

Krishna v. Colgate Palmolive Co., 7 F.3d 11, 15 (2d Cir.1993); *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904, 906 (10th Cir.1991); *Brown v. Connecticut General Life Ins. Co.*, 934 F.2d 1193, 1195 (11th Cir.1991); *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir.1990); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 278 (7th Cir.1989). *But see In re Estate of Egelhoff*, 139 Wash.2d 557, 989 P.2d 80, 92 (1999), *cert. granted*, 530 U.S. 1242, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000). In *Egelhoff*, the Washington Supreme Court held that the Washington statute equivalent to *section 9.302 of the Texas Family Code* was not preempted by ERISA.

913 F.2d 310, 312 (6th Cir. 2000). That circuit holds that plan administrators are to "follow plan documents to determine the designated beneficiary." *Id.* Thus, under the minority rule, the named beneficiary always prevails, without regard to any other circumstances or provisions of law. *See id.*

Patsy also claims the Supreme Court's decision in *Boggs*, which applied an expansive preemption analysis, supports this approach. *Boggs v. Boggs*, 520 U.S. 833, 117 S.Ct. 1754, 138 L. Ed. 2d 45 (1997). *Boggs* involved a clear case of conflict preemption in a different context. *Id.*, 520 U.S. at 840, 117 S.Ct. at 1760. It is asserted here for the proposition that ERISA precludes reliance upon federal common law when resolving a dispute between a named ERISA beneficiary and another claimant.

These arguments were recently presented to and rejected by the Fifth Circuit[5] in *Manning*. *Manning*, 212 F.3d at 870-74. We agree with the court's analysis and conclusion and find no reason to restate them here. *See id.*

B. The Majority Approach

A majority of the federal circuit courts which have considered this issue recognize that ERISA does not expressly address this circumstance. *Brandon*, 18 F.3d at 1326; *Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 278 (7th Cir.1990); *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693 (8th Cir.1989). One of our sister courts,

5. In *Manning v. Hayes*, 212 F.3d 866, 868 (5th Cir.2000), Hayes was represented by the attorney who represents Patsy.

the First Court of Appeals, has agreed. *Emmens,* 923 S.W.2d at 712. These courts have held that the issue is governed by federal common law. *Manning,* 212 F.3d at 871; *Emmens,* 923 S.W.2d at 712.

1. The Federal Courts: Waiver Required

At least three federal courts have concluded that under federal common law the designated beneficiary can waive rights to plan proceeds. *Brandon,* 18 F.3d at 1327; *Fox Valley,* 897 F.2d at 280; *Lyman,* 877 F.2d at 693. In *Brandon,* the Fifth Circuit examined federal common law to determine whether a spouse designated during marriage as an ERISA beneficiary of a life insurance policy waived her benefits in an agreed divorce decree. *Brandon,* 18 F.3d at 1324. The court followed the approach of the Eighth and Seventh Circuits and looked to state law for guidance. *Id.,* at 1326-27 (citing *Fox Valley,* 897 F.2d at 280-81; *Lyman,* 877 F.2d at 693).

Accordingly, the court adopted section 9.302[6] as a matter of federal common law, construing it to create a presumption of waiver absent redesignation following divorce. *Id.* at 1326. However, the court modified that federal common law by adding a requirement that "any waiver be voluntary and in good faith." *Id.* The Fifth Circuit recently reaffirmed this rule and has since applied it to employee pension benefit plans. *Manning,* 212 F.3d at 871; *Clift,* 210 F.3d at 271; *Rhoades v. Casey,* 196 F.3d 592, 600 (5th Cir.1999), *cert. denied,* 531 U.S. 924, 121 S.Ct. 298, 148 L.Ed.2d 240 (2000).

6. Actually, the Texas law relied upon in *Brandon* has been recodified. We cite to the current section for ease of reference.

Appendix B

2. The Houston Court: Divestment Imposed

The First Court of Appeals recently analyzed this issue as it relates to profit sharing plans. *Emmens,* 923 S.W.2d at 707. *Emmens* similarly involved a beneficiary designation of a former spouse which was not changed following a divorce. *Id.* In determining applicable federal common law, the court determined that *Brandon's* approach was incorrect because "the waiver issue [is] irrelevant[.]" *Id.* at 710. The court also disagreed with *Brandon's* characterization of section 9.302 as creating a presumption of waiver, reasoning that it simply nullifies the designation. *Id.* The court stated:

> . . . Beneficiary status is not lost because of the intent of the spouses (other than the intent to divorce), but because of the act of the legislature. It is the legislature's intent, expressed in the statute, not the parties' intent, that controls. Moreover, even if waiver were the issue, the *Brandon* approach has disadvantages. It encourages disputes by requiring a "little" bill of review proceeding in cases like this to determine whether an agreed property settlement was, in respect to ERISA assets, sufficiently voluntary, explicit, and in good faith. We see no need for this procedure. Waiver of ERISA benefits is not against public policy. Beneficiaries may waive their interests. 29 U.S.C. § 1055(c)(1)(A)(i); *Fox Valley,* 897 F.2d at 279. If state courts are "suitably armored" to protect these rights, as *Brandon* states, then the waiver should not have to be proved first in state courts and then again in federal courts. Once is enough.

Id. at 710-11. The court then adopted the rule of section 9.302, without modification, as federal common law on the issue and held that divorce automatically terminated a former spouse's designation as the primary beneficiary under an ERISA plan. *Id.* at 712.

V. APPLICATION

We agree with the majority approach that ERISA does not expressly address whether a former spouse designated as the primary beneficiary of an ERISA-qualified pension plan is entitled to the proceeds under that plan. *Brandon,* 18 F.3d at 1326; *Fox Valley,* 897 F.2d at 278; *Lyman,* 877 F.2d at 693; *Emmens,* 923 S.W.2d at 712. It follows, then, that the issue is governed by federal common law. *Manning,* 212 F.3d at 871.

On questions of federal common law, we are bound to follow only the decisions of the United States and Texas Supreme Courts. *Emmens,* 923 S.W.2d at 709. The decisions of other federal courts are persuasive authority only. *Id.* We recognize their superior expertise in federal law. *Id.* Nevertheless, we are entitled to follow the federal common law of any federal circuit we find persuasive. *Id.* We find guidance in the Fifth Circuit's and our sister court's approach. *See id.; Manning,* 212 F.3d at 871.

These facts are very similar to those in *Brandon. Brandon,* 18 F.3d at 1327. As in *Brandon,* Frank and Patsy signed a voluntary property settlement agreement that included an explicit mutual waiver of any rights each had in the other's pension plan. *See id.* During the divorce, only

Patsy was represented by counsel. *See id.* Patsy's attorney drafted the settlement agreement and divorce decree which specifically provided that Patsy would have no ownership or beneficial rights in Frank's pension plans. *See id.* The settlement agreement awarded Patsy a portion of the community estate, including both a condominium and a car. It was approved by the court as "just and right" at Patsy's request. Thus, if we were to apply *Brandon,* we would find her "waiver" to be voluntary and in good faith, and Patsy would not be entitled to the proceeds. *See id.*

In applying our sister court's approach, we need not look any further than the fact that Frank and Patsy were divorced. *Emmens,* 923 S.W.2d at 712. According to section 9.302, applied as federal common law, the divorce terminated Patsy's designation as the primary beneficiary unless she was (1) designated in the decree, (2) redesignated by Frank after the divorce, or (3) designated as a trustee for a child or dependent. tex.Fam.Code Ann. § 9.302(a). These exceptions are absent from the record. Thus, if we were to follow *Emmens,* we would find that Patsy is not entitled to the proceeds. *Emmens,* 923 S.W.2d at 712.

We agree with our sister court's approach. As a result, under federal common law, Patsy is not entitled to the proceeds of Frank's pension plans, because the divorce automatically terminated her designation as the primary beneficiary and none of the alternative designations of 9.302(a) are applicable. *See id.*

Appendix B

VI. CONCLUSION

We find that the Texas redesignation statute, applied as federal common law, prevents a former spouse from receiving ERISA-qualified pension plan benefits, absent an alternative designation. Having determined that the trial court erred in making a contrary finding, we find the award of attorney's fees to Patsy was likewise improper. We reverse the trial court's judgment and hold that Diana as the independent executrix of Rita's estate, the contingent beneficiary, was entitled to the proceeds of the pension plan. We remand the cause to the trial court for further proceedings consistent with this opinion.

Appendix B

OPINION DENYING MOTION FOR REHEARING

On January 10, 2001, we determined that the Texas redesignation statute, applied as federal common law, prevents a former spouse from receiving ERISA-qualified pension plan benefits, absent one of its exceptions. *Weaver v. Keen,* 43 S.W.3d 537, 544 (Tex.App.—Waco Jan. 10, 2001, no pet. h.). Having determined that the trial court erred in making a contrary finding, we reversed the judgment and remanded for further proceedings. *Id.*

On rehearing, Keen requested that we defer our decision pending the United States Supreme Court's disposition of *Egelhoff v. Egelhoff,* which addresses similar issues. The United States Supreme Court has since issued *Egelhoff v. Egelhoff,* 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001). We find that it does not affect the analysis applicable to this case.

The only issue in *Egelhoff* was whether ERISA[1] preempts a Washington statute providing that the designation of a spouse as the beneficiary of an employee benefit plan is revoked automatically upon divorce. *Id.* at __, 121 S.Ct. at 1327-28. The Supreme Court held that it does. *Id.* at __, 121 S.Ct. at 1328-29. The Court reasoned that giving effect to state statutes that purport to revoke beneficiary designations would require plan administrators "to master the relevant laws of 50 States" and would make uniform national plan administration impossible. *Id.* Similarly, our opinion stated

---

1. Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § § 1001-1461 (West 1999 & Supp.2000).

that federal law, not section 9.302 of *the Texas Family Code*, determined who was entitled to proceeds of an employee benefit plan. *Weaver,* 43 S.W.3d at 541. Thus, our conclusion that federal law controls is supported by *Egelhoff.*

Having established that our state law is preempted, we next determined the applicable federal law which governed the resolution of the dispute. *Id.* In making this determination, we looked "to either the statutory language [of ERISA] or, finding no answer there, to federal common law" which "may draw guidance from analogous state law." *Id.* (citing *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321, 1325 (5th Cir.1994)). There is presently a circuit split on this issue. *Id.* (citing *Manning v. Hayes,* 212 F.3d 866, 870 (5th Cir.2000), *cert. denied,* __ U.S. __, 121 S.Ct. 1401, 149 L.Ed.2d 345, (2001)).

We agreed with the majority approach that ERISA does not expressly address whether a former spouse designated as the primary beneficiary of an ERISA-qualified pension plan is entitled to the proceeds under that plan. *Id.* at __, 121 S.Ct. at 1328-29 (citing *Brandon,* 18 F.3d at 1326; *Fox Valley & Vicinity Const. Workers Pension Fund v. Brown,* 897 F.2d 275, 278 (7th Cir.1990); *Lyman Lumber Co. v. Hill,* 877 F.2d 692, 693 (8th Cir.1989); *Emmens v. Johnson,* 923 S.W.2d 705, 712 (Tex.App.—Houston [1st Dist.] 1996, writ denied)). We held, then, that the issue is governed by federal common law. *Id.*

At least three federal courts have concluded that under federal common law the designated beneficiary can waive rights to plan proceeds. *Brandon,* 18 F.3d at 1327; *Fox Valley,* 897 F.2d at 280; *Lyman,* 877 F.2d at 693. In *Brandon,* the

Fifth Circuit examined federal common law to determine whether a spouse designated during marriage as an ERISA beneficiary of a life insurance policy waived her benefits in an agreed divorce decree. *Brandon,* 18 F.3d at 1324. The court followed the approach of the Eighth and Seventh Circuits and looked to state law for guidance. *Id.* at 1326-27 (citing *Fox Valley,* 897 F.2d at 280-81; *Lyman,* 877 F.2d at 693).

Accordingly, the court adopted section 9.302[2] as a matter of federal common law, construing it to create a presumption of waiver absent redesignation following divorce. *Id.* at 1326. However, the court modified that federal common law by adding a requirement that "any waiver be voluntary and in good faith." *Id.* The Fifth Circuit recently reaffirmed this rule in *Manning. Manning,* 212 F.3d at 871. On March 26, 2001, five days after *Egelhoff* was issued, the United States Supreme Court denied the petition for writ of certiorari in *Manning.* (*Manning v. Hayes,* __ U.S. __, 121 S.Ct. 1401, 149 L.Ed.2d 345 (2001)).

The First Court of Appeals also analyzed the issue in this case as it relates to profit sharing plans. *Emmens,* 923 S.W.2d at 707. *Emmens* similarly involved a beneficiary

---

2. Actually, the Texas law referred to in *Brandon* is former Family Code section 3.633. *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321, 1326 (5th Cir.1994). Section 3.633 was recodified as section 9.302 with changes not material here. Act of July 20, 1987, 70th Leg., 2d C.S., ch. 50, § 1, sec. 3.633, 1987 Tex.Gen.Laws 159, *recodified by* Act of April 3, 1997, 75th Leg., R.S., ch. 7, § 1, sec. 9.302, 1997 Tex.Gen.Laws 1, 41. We cite to the current section for ease of reference.

designation of a former spouse which was not changed following a divorce. *Id.* In determining applicable federal common law, the court determined that *Brandon's* approach was incorrect because "the waiver issue [is] irrelevant[.]" *Id.* at 710.

The court also disagreed with *Brandon's* characterization of section 9.302 as creating a presumption of waiver, reasoning that it simply nullifies the designation. *Id.* The court then adopted the rule of section 9.302, without modification, as federal common law on the issue and held that divorce automatically terminated a former spouse's designation as the primary beneficiary under an ERISA plan. *Id.* at 712.

Accordingly, although we were guided by the Fifth Circuit's approach, ultimately we adopted our sister court's approach. *Weaver,* 43 S.W.3d at 544. That is, we adopted section 9.302, without modification, as federal common law on the issue and held that divorce automatically terminated a former spouse's designation as the primary beneficiary under an ERISA plan. *Id.* As a result, we found that the Texas redesignation statute, applied as federal common law, prevents a former spouse from receiving ERISA-qualified pension plan benefits, absent one of its exceptions. *Id.*

Because our approach was the same as the Fifth Circuit's approach in *Manning,* absent the modification, and because the United States Supreme Court has recently denied the petition for writ of certiorari in *Manning,* we continue to believe that our original disposition of this case was correct. Furthermore, as we stated in our original opinion, even under the Fifth Circuit's approach, we believe the record

demonstrates that Patsy's "waiver" was voluntary and made in good faith. *Id.* at 544. Thus, *Manning* would also prevent her from receiving the proceeds. *Manning*, 212 F.3d at 871.

For these reasons, we deny the motion for rehearing.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COUNTY COURT, DALLAS COUNTY, TEXAS FILED JULY 6, 1999

IN THE COUNTY COURT

AT LAW NO. 4

DALLAS COUNTY, TEXAS

NO. 97-5343-D

DIANA WEAVER, INDEPENDENT EXECUTRIX OF THE ESTATE OF FRANCIS J. WEAVER AND RITA MARIE WILSON WEAVER

VS.

PATSY KEEN, TEACHERS INSURANCE AND ANNUITY ASSOCIATION d/b/a TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA d/b/a TIAA CREF d/b/a TIAA, AND COLLEGE RETIREMENT EQUITIES FUND d/b/a CREF d/b/a TIAA CREF

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 29, 1999 this Court called this case for trial. Plaintiff, Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate Rita Marie Wilson Weaver (collectively "Weaver") appeared in person and by her attorney of record, Steven J. Pawlowski and announced ready. Defendant, Patsy (Pat) Keen ("Keen") appeared in person and by her attorney of record, Maurice Bresenhan Jr. announced ready. Defendants, Teachers Insurance and Annuity Association of America d/b/a TIAA ("TIAA") and College Retirement Equities Fund d/b/a CREF ("CREF") did

not appear because all issues concerning Teachers Insurance and Annuity Association and College Retirement Equities Fund had been previously adjudicated pursuant to:

i. the "First Amended Motion Of Defendants Teachers Insurance and Annuity Association and College Retirement Equities Fund For Summary Judgment On Claims of Defendant Patsy Keen" and "Partial Summary Judgment Order" dated February 26, 1999;

ii. Teachers Insurance and Annuity Association and College Retirement Equities Fund "Motion for Nonsuit" and "Order of Nonsuit" dated February 26, 1999;

iii. "Order Granting Request for Interpleader" signed April 24, 1998; and

iv. "Joint Notice of Nonsuit", filed by Teachers Insurance and Annuity Association, College Retirement Equities Fund, and Plaintiffs on June 23, 1998.

Weaver and Keen waived trial by jury and submitted all matters to the Court. The Court thereafter advised the parties of judgment in favor of Keen. The Court signed its Final Judgment on June 18, 1999. Pursuant to the request of Weaver, the Court makes the following findings of fact and conclusions of law:

Appendix C

FINDINGS OF FACT

1. Pat Keen and Patsy Keen are the same person.

2. Keen and Francis Joseph Weaver were married on December 23, 1967.

3. During a portion of the time Keen and Francis Joseph Weaver were married, Francis Joseph Weaver was employed by Baylor College of Medicine in Houston, Texas.

4. Francis Joseph Weaver was employed by Baylor College of Medicine on or about August 3, 1970 and terminated his employment on or about July 1, 1980.

5. On or about December 7, 1972, as part of his employee benefits at Baylor, Francis Joseph Weaver applied for both a TIAA contract (herein "TIAA Contract") and a CREF certificate (herein "CREF Certificate"). The TIAA Contract No. A574775-1 was issued on or about January 1, 1973. The CREF Certificate No. P574775-8 was issued on or about January 1, 1973.

6. Francis Joseph Weaver in the application for the TIAA Contract and CREF Certificate designated Patsy Keen Weaver, Keen, as his primary beneficiary and Rita Marie Wilson Weaver as his contingent beneficiary.

7. On September 2, 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA").

Appendix C

8. The TIAA-CREF Contract and CREF Certificate are 403(b) plans as that term is used in ERISA and the Internal Revenue Code. Such plans are subject to ERISA.

9. Because Francis Joseph Weaver had at least one hour of service under a covered plan after September 2, 1974, the TIAA Contract and CREF Certificate were covered by ERISA.

11. No contributions were made on Francis Joseph Weaver's behalf to either the TIAA Contract or CREF Certificate after Francis Joseph Weaver terminated his employment at Baylor College Medicine.

12. Keen and Francis Joseph Weaver were divorced by the 310th Judicial District Court of Harris County, Texas in Cause No. 81-6415 on September 17, 1982.

13. Francis Joseph Weaver did not have at least one hour of service or at least one hour of paid leave under any plan connected with his employment at Baylor College of Medicine after termination of his employment on July 1, 1980.

14. After his divorce from Keen, Francis Joseph Weaver married Diana Weaver.

15. Both the TIAA Contract and CREF Certificate were "employee pension benefit plans", 29 USC § 1002(2)(A).

16. On August 31, 1984, the Retirement Equity Act ("REA"), amending ERISA became effective.

Appendix C

17. When it passed REA, Congress expressly chose not to apply the mandatory spousal beneficiary designations to existing plans unless the plan participant had more than one hour of credited service after the effective date of REA or had more than one hour of credited paid leave after the effective date of REA.

18. During the time Francis Joseph Weaver and Keen were married and after their divorce, Francis Joseph Weaver periodically received notices from TIAA and CREF relating to the TIAA Contract and CREF Certificate and the value of each.

19. Francis Joseph Weaver was advised by both TIAA and CREF of the passage of the Retirement Equity Act and its effect.

20. Francis Joseph Weaver, after his divorce from Keen applied for and received a private term insurance policy from TIAA designating Diana Weaver as his primary beneficiary.

21. Francis Joseph Weaver never changed the designation of Keen as his primary beneficiary on the TIAA Contract or CREF Certificate.

22. Francis Joseph Weaver died on June 16, 1995.

23. Diana Weaver is the executrix of the estates of Francis Joseph Weaver and Rita Marie Wilson Weaver.

Appendix C

24. After the death of Francis Joseph Weaver, Keen made application to receive benefits as the beneficiary designated under the TIAA Contract and CREF Certificate.

25. The plan administrators determined from the plan documents that Keen was the designated beneficiary and entitled to the benefits under the TIAA Contract and CREF Certificate.

26. The plan administrators in exchange for the Francis Joseph Weaver contracts, issued Keen an annuity contract from TIAA, number S022889-6 (herein "Keen Contract") and an annuity certificate from CREF, number ON10781-8, in her name (herein "Keen Certificate").

27. The stipulated reasonable and necessary attorney fees of Keen are $40,000.00; the Court finds such fees to be reasonable and necessary for Keen's representation through trial.

28. ERISA defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder". 29 USC § 1002(8).

29. ERISA, 29 USC § 1104(a)(1)(D), requires that plan fiduciaries discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . . "in accordance with the documents and instruments governing the plan. . . ."

Appendix C

30. The CREF Certificate defines Francis Joseph Weaver as the participant and allows the participant to change the beneficiary with that change being effective if made by the participant even if the change is received after the death of a participant.

31. The TIAA Contract defines Francis Joseph Weaver as the annuitant and similarly allows the annuitant to change the beneficiary designation even if the annuitant's change of beneficiary designation is received after the death of the annuitant.

32. The CREF Certificate contains a choice of law provision designating the laws of the State of New York as controlling the validity and effect of the Certificate.

33. The TIAA Contract similarly contains a choice of law provision.

34. At the time Keen's pleading requesting declaratory relief against Weaver was filed, the only affirmative relief sought against Keen by Weaver was for conversion.

35. All or a substantial part of the events or commissions giving rise to Weaver's claims arose in Dallas County.

36. Dallas, County is the county where TIAA and CREF's principal place of business in Texas is located.

37. Weaver's claims against Keen arise out of the same transactions or occurrences as do Weaver's claims against TIAA and CREF.

Appendix C

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this case.

2. Venue is proper in this court.

3. Family Code Section 3.632 became effective November 1, 1987 and applied only to decrees or judgments rendered after that date. Accordingly even if there was no preemption this statute would not control disposition of this case.

4. Keen is the beneficiary of both the TIAA Contract and the CREF Certificate.

5. Francis Joseph Weaver was the participant of both the TIAA Contract and CREF Certificate.

6. Weaver was not a beneficiary under either the TIAA Contract or the CREF Certificate.

7. Weaver's attempt to revoke the beneficiary designation and to designate a new beneficiary under the TIAA Contract and CREF Certificate was ineffective.

8. The TIAA Contract and the CREF Certificate were each "employee pension benefit plans" 29 USC § 1002(2)(A).

9. The beneficiary designation for the TIAA Contract and CREF Certificate is an integral part of the plan documents that the plan fiduciaries are required to rely on and to enforce solely for the benefit of participants and beneficiaries.

Appendix C

10. The effect of Family Code Section 3.633 and its recodification as Family Code Section 9.302 on beneficiary designations for retirement benefits relates to the basic services that the plan administrators may or must provide to plan participants and beneficiaries and is thus preempted by Section 514 of ERISA, 29 USC § 1144(a).

11. Texas common law construing language in decrees and property settlements to have the effect of foregoing and giving up beneficiary status are also laws that relate to the services that plan administrators may or must provide to plan participants and beneficiaries and are also preempted by Section 514 of ERISA, 29 USC § 1144(a).

12. Family Code Section 3.633 and its recodification as Family Code Section 9.302 relating to beneficiary designations for retirement benefits is a state law relating to a subject covered by ERISA, as amended by REA, and is thus preempted to the extent that it purports to apply to ERISA plans.

13. Even if Texas statutory and common law were not preempted by ERISA the effect of the beneficiary designations in the TIAA Contract and CREF Certificate would be controlled by the laws of the State of New York which make the participant's designation controlling.

14. Keen has not converted any property of Weaver.

15. Keen has no privity of contract with Weaver and has breached no contract with Weaver.

16. Keen's receipt of plan proceeds was a receipt of her own property and thus did not constitute unjust enrichment.

Appendix C

17. Keen has not given up any rights under either the TIAA Contract or CREF Certificate by waiver, estoppel or otherwise.

18. Weaver should take nothing with regard to any claims against Keen, TIAA, and CREF.

19. Keen should take nothing with regard to any claims she may have against TIAA and CREF except as is necessary to implement this Court's judgment.

20. TIAA and CREF should take nothing with regard to any claims held by TIAA and CREF against Keen and Weaver.

21. Keen is entitled to recover and to own and possess the TIAA Contract benefits and CREF Certificate benefits free of any adverse claims by Weaver.

22. Keen is entitled to recover her attorney fees in the amount of $40.000.00 from Weaver.

23. Keen is entitled to recover her taxable costs from Weaver.

24. Any finding of fact that is in whole or part a conclusion of law shall be considered to be a conclusion of law to the extent it is and each conclusion of law that is in whole or part a finding of fact shall be deemed to be a fact finding to the extent it is.

Signed this 6 day of July, 1999.

s/ [illegible]
JUDGE PRESIDING

APPENDIX D — FINAL JUDGMENT OF THE COUNTY COURT, DALLAS COUNTY, TEXAS DATED JUNE 18, 1999

IN THE COUNTY COURT

AT LAW NO. 4

DALLAS COUNTY, TEXAS

NO. 97-5343-D

DIANA WEAVER, INDEPENDENT EXECUTRIX OF THE ESTATE OF FRANCIS J. WEAVER AND RITA MARIE WILSON WEAVER

VS.

PATSY KEEN, TEACHERS INSURANCE AND ANNUITY ASSOCIATION d/b/a TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA d/b/a TIAA CREF d/b/a TIAA, AND COLLEGE RETIREMENT EQUITIES FUND d/b/a CREF d/b/a TIAA CREF

FINAL JUDGMENT

On April 29, 1999 this matter came on for trial.

Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate Rita Marie Wilson Weaver appeared in person and by her attorney of record, Steven J. Pawlowski.

Patsy (Pat) Keen appeared in person and by her attorney of record, Maurice Bresenhan Jr.

Appendix D

Teachers Insurance and Annuity Association of America d/b/a TIAA and College Retirement Equities Fund d/b/a CREF did not appear because all issues concerning Teachers Insurance and Annuity Association and College Retirement Equities Fund had previously been adjudicated pursuant to:

i. the "First Amended Motion Of Defendants Teachers Insurance and Annuity Association and College Retirement Equities Fund For Summary Judgment On Claims of Defendant Patsy Keen" and "Partial Summary Judgment Order" dated February 26, 1999;

ii. Teachers Insurance and Annuity Association and College Retirement Equities Fund "Motion for Nonsuit" and "Order of Nonsuit" dated February 26, 1999;

iii. "Order Granting Request for Interpleader" signed April 24, 1998; and

iv. "Joint Notice of Nonsuit", filed by Teachers Insurance and Annuity Association, College Retirement Equities Fund, and Plaintiffs on June 23, 1998.

Plaintiffs, Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate of Rita Marie Wilson Weaver, and Defendant Patsy Keen waived trial by jury pursuant to "Joint Notice of Waiver of Jury Trial" and consented to trial by the Court of all questions of fact and law.

Appendix D

Plaintiffs, Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate of Rita Marie Wilson Weaver, and Defendant Patsy Keen announced ready for trial.

The Court after having considered the evidence and argument of counsel is of the opinion that Plaintiffs, Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate of Rita Marie Wilson Weaver, take nothing by way of their claims against Patsy Keen.

The Court is of the further opinion that Patsy Keen should have and recover the proceeds of the Teachers Insurance Annuity Association Retirement Annuity Contract No. A-574775-1 which proceeds were reinvested in Teachers Insurance and Annuity Association Contract by Patsy (Pat) Keen under Contract No. S022889-6 and the proceeds of the College Retirement Equities Fund Retirement Unit – Annuity Certificate No. P574775-8 which proceeds were reinvested by Patsy (Pat) Keen under Certificate No. ON10781-8.

It is accordingly ORDERED, ADJUDGED and DECREED that Plaintiffs Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate of Rita Marie Wilson Weaver take nothing against Patsy Keen, Teachers Insurance and Annuity Association d/b/a TIAA and College Retirement Equities Fund d/b/a CREF.

Appendix D

It is further ORDERED, ADJUDGED, and DECREED that Patsy (Pat) Keen have and recover all proceeds, together with all accrued interest and investment appreciation and increase, of Teachers Insurance Annuity Association Retirement Annuity Contract No. A 574775-1 reinvested by Patsy (Pat) Keen under Teachers Insurance Annuity Association Contract No. S022889-6 ("Contract").

It is further ORDERED, ADJUDGED, and DECREED that Patsy (Pat) Keen have and recover all proceeds, together with all accrued interest and investment appreciation and increase, of College Retirement Equities Fund Retirement Unit – Annuity Certificate No. P574775-8 which proceeds as reinvested by Patsy (Pat) Keen under Certificate No. ON10781-8 ("Certificate").

It is further ORDERED and DECREED that upon the passage of thirty (30) business days following the signing of this Final Judgment that Teachers Insurance Annuity Association shall liquidate the unpaid proceeds, together with all accrued interest and investment appreciation and increase, of the Teachers Insurance Annuity Association Contract and distribute said proceeds and all accrued interest and investment appreciation and increase to Patsy Keen.

It is further ORDERED and DECREED that College Retirement Equities Fund shall upon the passage of thirty (30) business days following the signing of this Final Judgment liquidate the unpaid proceeds, together with all accrued interest and investment appreciation and increase of the College Retirement Equities Fund Certificate and distribute said proceeds together with all accrued interest and investment appreciation and increase to Patsy Keen.

Appendix D

It is further ORDERED, ADJUDGED and DECREED that in the event a timely filed motion for new trial is filed that the distributions ordered to be made by Teachers Insurance Annuity Association and College Retirement Equities Fund shall not occur until thirty (30) days after all timely filed motions for new trial have been overruled by written order or by operation of law at which time such distributions by Teachers Insurance Annuity Association and College Retirement Equities Fund are ORDERED to be made to Patsy (Pat) Keen.

It is further ORDERED that Patsy Keen take nothing by way of her claims against Teachers Insurance Annuity Association and College Retirement Equities Fund except as is necessary to enforce the distributions ordered to be made to Patsy Keen by Teachers Insurance Annuity Association and College Retirement Equities Fund as provided for herein.

It is further ORDERED that Patsy Keen shall have judgment, jointly and severally, in the amount of $40,000.00 against Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate of Rita Marie Wilson Weaver.

It is further ORDERED that all costs incurred herein are taxed against Diana Weaver, Independent Executrix of the Estate of Francis J. Weaver and Diana Weaver, Independent Executrix of the Estate of Rita Marie Wilson Weaver.

It is further ORDERED that all judgments shall bear interest at the rate of ten percent (10%) per annum compounded annually from the date of the signing of this

Appendix D

Final Judgment and that all distributions ordered to be made shall bear interest at the rate of ten percent (10%) per annum compounded annually from the date such distributions are ordered to be made as provided above until such distributions are made.

It is further ORDERED that execution issue on all judgments contained within this decree and that Patsy Keen shall have all such writs, processes, and orders as are necessary to enforce the judgments and distributions ordered herein.

It is further ORDERED that relief not specifically granted is denied.

Signed this 18 day of June, 1999.

s/ [illegible]
JUDGE PRESIDING

APPENDIX E — RELEVANT STATUTES

29 U.S.C.A. § 1001. Congressional findings and declaration of policy

* * *

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character

and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C.A. 1002. Definitions

For purposes of this subchapter:

* * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

Appendix E

SUBTITLE B — REGULATORY PROVISIONS

Part 1 — Reporting and Disclosure

29 U.S.C. § 1056. Form and payment of benefits

* * *

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit

payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph —

(i) the term "qualified domestic relations order" means a domestic relations order —

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies —

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order —

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order. . .

* * *

(G)(i) In the case of any domestic relations order received by a plan —

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures — (I) shall be in writing,

(II) shall provide for notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v) —

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved, then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in —

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H), then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant. . .

* * *

29 U.S.C. § 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan . . .

Appendix E

(b) Requisite features of plan

Every employee benefit plan shall —

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

Appendix E

Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Appendix E

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

Appendix E

29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities. . .

* * *

Appendix E

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

Appendix E

TEXAS REDESIGNATION STATUTE (present)

Tex. Fam. Code § 9.302. Pre-Decree Designation of Ex-Spouse as Beneficiary in Retirement Benefits and Other Financial Plans

(a) If a decree of divorce or annulment is rendered after a spouse, acting in the capacity of a participant, annuitant, or account holder, has designated the other spouse as a beneficiary under an individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit- sharing, or other employer plan or financial plan of an employee or a participant in force at the time of rendition, the designating provision in the plan in favor of the other former spouse is not effective unless:

(1) the decree designates the other former spouse as the beneficiary;

(2) the designating former spouse redesignates the other former spouse as the beneficiary after rendition of the decree; or

(3) the other former spouse is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent of either former spouse.

(b) If a designation is not effective under Subsection (a), the benefits or proceeds are payable to the named alternative beneficiary of, if there is not a named alternative beneficiary, to the designating former spouse.

(c) A business entity, employer, pension trust, insurer, financial institution, or other person obligated to pay retirement benefits or proceeds of a financial plan covered by this section who pays the benefits or proceeds to the beneficiary under a designation of the other former spouse that is not effective under Subsection (a) is liable for payment of the benefits or proceeds to the person provided by Subsection (b) only if:

(1) before payment of the benefits or proceeds to the designated beneficiary, the payor receives written notice at the home office or principal office of the payor from an interested person that the designation of the beneficiary or fiduciary is not effective under Subsection (a); and

(2) the payor has not interpleaded the benefits or proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.

(d) This section does not affect the right of a former spouse to assert an ownership interest in an undivided pension, retirement, annuity, or other financial plan described by this section as provided by this subchapter.

(e) This section does not apply to the disposition of a beneficial interest in a retirement benefit or other financial plan of a public retirement system as defined by Section 802.001, Government Code.

TEXAS REDESIGNATION STATUTE (prior)

Tex. Fam. Code 3.633. Disposition of Beneficial Interests in Retirement Benefits and Other Financial Plans

(a) In a decree of divorce or annulment the court shall determine all rights of both spouses in any pension, retirement plan, annuity, or other form of savings, bonus, profit-sharing, or other employer or financial plan of an employee, whether or not self-employed, in the nature of compensation or savings.

(b) If a decree of divorce or annulment is rendered after a spouse has designated the other spouse as a beneficiary under a financial plan described by this section in force at the time of rendition, a provision in the plan in favor of the designated spouse is not effective unless: (1) the decree designates the former spouse as the beneficiary;

(2) the designating spouse redesignates the former spouse as the beneficiary after rendition of the decree; or

(3) the former spouse is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent of either former spouse.

(c) If a designation is not effective under Subsection (b) of this section, the benefits or proceeds are payable to the named alternative beneficiary, or, if there is not a named alternative beneficiary, to the designating former spouse. A business entity, employer, pension trust, insurer, or other person obligated to pay benefits or proceeds on a financial plan covered by this section who pays the benefits or proceeds to the beneficiary under a designation that is not effective under Subsection (b) of this section is liable for payment of the benefits or proceeds to the person provided by this subsection only if:

(1) before payment of the benefits or proceeds to the designated beneficiary, the payor receives written notice at the home office or principal office of the payor from an interested person that the designation of the beneficiary or fiduciary is not effective under Subsection 15

(b) of this section; and

(2) the payor has not interpleaded the benefits or proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.

(d) This section does not affect the right of a former spouse to assert an ownership interest in an undivided pension, retirement, annuity, or other financial plan described by this section as provided by Subchapter F of this chapter.

Appendix E

(e) This section does not apply to the disposition of a beneficial interest in a retirement benefit or any other financial plan of a public retirement system as defined by Section 802.001, Government Code.

(2)

No. 03-425

Supreme Court, U.S.
FILED
OCT 2 2 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PATSY KEEN,

Petitioner,

v.

DIANA WEAVER, INDEPENDENT EXECUTRIX OF THE ESTATES OF FRANCIS J. WEAVER AND RITA MARIE WILSON WEAVER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN W. SLOAN
Counsel of Record
RUSSELL G. GULLY

THOMPSON & KNIGHT LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
Telephone: (214) 969-1700

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 11

QUESTION PRESENTED

Is an employee benefit plan beneficiary's waiver of her interest in benefits in favor of the participant enforceable under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, where the waiver was specific, knowing, and voluntary and was contained in a divorce decree entered into before the effective date of the Retirement Equity Act of 1984?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
RESPONDENT'S BRIEF IN OPPOSITION	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
A. The decision below does not conflict with the text of ERISA, the Court's decision in *Egelhoff v. Egelhoff*, or the decisions of the Sixth Circuit	4
B. The decision below does not violate ERISA's "anti-alienation" rule	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Estate of Altobelli v. International Business Machines Corp., 77 F.3d 78 (4th Cir. 1996).....4, 12, 13

Brandon v. Travelers Insurance Co., 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995)..... 4

Clift v. Clift, 210 F.3d 268 (5th Cir. 2000) 4

Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991), *cert. dismissed*, 505 U.S. 1233 (1992)..... 7

Darden v. Nationwide Mutual Insurance Co., 796 F.2d 701 (4th Cir. 1986).....11

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 7, 8, 10, 15

Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.), *cert. denied*, 498 U.S. 820 (1990).....4, 12

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990).....12

Hill v. AT&T Corp., 125 F.3d 646 (8th Cir. 1997)..... 4

Lutheran Medical Center v. Contractors, Laborers, Teamsters & Engineers Health and Welfare Plan, 25 F.3d 616 (8th Cir. 1994)..... 7

Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989)..... 4

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988).....5, 6, 7

Manning v. Hayes, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) 4

TABLE OF AUTHORITIES – Continued

Page

McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) 8, 9, 10

Melton v. Melton, 324 F.3d 941 (7th Cir. 2003)..... 4

Memorial Hospital System v. Northbrook Life Insurance Co., 904 F.2d 236 (5th Cir. 1990) 7

Metropolitan Life Insurance Co. v. Bigelow, 283 F.3d 436 (2d Cir. 2002).....14

Metropolitan Life Insurance Co. v. Wheaton, 42 F.3d 1080 (7th Cir. 1994).....14

Metropolitan Life Insurance Co. v. Marsh, 119 F.3d 415 (6th Cir. 1997) 9, 10, 14

Misic v. Building Service Employees Health and Welfare Trust, 789 F.2d 1374 (9th Cir. 1996)..... 7

Mohamed v. Kerr, 53 F.3d 911 (8th Cir.), *cert. denied*, 516 U.S. 868 (1995) 4

Rhoades v. Casey, 196 F.3d 592 (5th Cir. 1999), *cert. denied*, 531 U.S. 924 (2000) 4

St. Francis Regional Medical Center v. Blue Cross & Blue Shield of Kan., Inc., 49 F.3d 1460 (10th Cir. 1995)..... 7

Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143 (9th Cir. 2000), *cert. denied*, 531 U.S. 1074 (2001).....14

STATUTES

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* .....*passim*

Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984)..... 3

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

H.R. Rep. No. 807, 93d Cong., 2d Sess. 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670 12

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari. In the decision below, the Supreme Court of Texas held that petitioner's knowing and voluntary waiver of her beneficiary interest in her husband's employee benefits was enforceable under ERISA. That holding is supported by the text of ERISA, Supreme Court precedent, and the holdings of the courts of appeals that have addressed the question. Thus, there is no conflict between the decision below and any decision of this Court, and this case does not turn on any issue of law on which there is a conflict among the circuits.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at __ S.W.3d __, 46 Tex. Sup. Ct. J. 804, and is reprinted at Appendix A to the Petition for a Writ of Certiorari. The opinion of the Court of Appeals of Texas is reported at 43 S.W.3d 537 and is reprinted at Appendix B to the Petition. The district court's findings of facts and conclusions of law and its final judgment are reprinted at Appendix C and D, respectively, to the Petition.

STATEMENT OF THE CASE

Frank Weaver and the petitioner, Patsy Keen, were married in 1967. During part of their marriage Frank was employed by Baylor College of Medicine. In 1972, as part of his employee benefits at Baylor, Frank applied for both a TIAA contract (the "TIAA Contract") and a CREF certificate (the "CREF Certificate"). In his application Frank

designated Keen, his spouse at the time, as his primary beneficiary and his mother, Rita Marie Weaver, as the contingent beneficiary. The TIAA Contract and CREF Certificate were issued in 1973. It is undisputed that these annuity plans are part of "employee pension benefit plans" as defined in ERISA. *See* 29 U.S.C. § 1002(2)(A).

Keen subsequently filed for divorce from Frank in 1981. During the divorce, Frank was not represented by counsel, but Keen was represented by her current attorney, Maurice Bresenhan. Bresenhan drafted the divorce decree and agreement incident to divorce, which specifically provided that Keen would have no ownership or beneficial rights in Frank's TIAA Contract or CREF Certificate.

Frank and respondent Diana Weaver were married in 1983. They remained married until Frank's unexpected death in 1995. Keen learned of Frank's death through a relative of hers who had read his obituary in the newspaper. Later she contacted TIAA and CREF and applied for benefits under the TIAA Contract and the CREF Certificate. TIAA and CREF thereafter paid part of the proceeds – over $57,000 – to Keen.

Rita Weaver, as the contingent beneficiary, sued Keen and TIAA and CREF, claiming that she was entitled to the annuity proceeds because Keen had waived any claim to the benefits in the divorce decree. Rita died while the suit was pending, so Diana Weaver, as independent executrix of Frank's and Rita's estates, continued the suit. TIAA and CREF interpleaded the remaining benefits.

After a bench trial, the district court held that Keen was entitled to the plan proceeds. The court of appeals reversed. The Supreme Court of Texas affirmed, holding

that Weaver was entitled to the proceeds because in the divorce decree Keen had specifically and voluntarily waived any claim to the plan funds, and her waiver was enforceable under ERISA.

SUMMARY OF THE ARGUMENT

The only issue in this case is this: where an employee benefit plan participant designates his spouse as beneficiary, and the participant and the beneficiary subsequently divorce and the ex-spouse knowingly and voluntarily waives any claim to the benefits in a divorce decree entered into before the effective date of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984), is the former spouse nonetheless entitled to the employee benefits? The issue is governed by federal law, including ERISA.

In this case the Supreme Court of Texas followed the decisions of the federal courts of appeals, which have held that under ERISA a beneficiary may effectively waive her claim to benefits so long as the waiver is voluntary and specific. Here, it is undisputed that Keen knowingly and voluntarily waived her rights to the retirement benefits at issue when she signed the couple's decree of divorce and agreement incident to divorce in 1982. Thus, as a result of the valid waiver, Rita Marie Weaver, as Frank's contingent beneficiary, became vested in Frank's retirement benefits upon his death. Those retirement benefits then became a part of the contingent beneficiary's estate upon her death in 1997.

ARGUMENT

A. The decision below does not conflict with the text of ERISA, the Court's decision in *Egelhoff v. Egelhoff*, or the decisions of the Sixth Circuit.

A number of federal courts have addressed the issue central to this case. They hold that a designated beneficiary's waiver of her right to employee benefits in favor of the plan participant is not prohibited by, and is therefore enforceable under, ERISA. Moreover, because ERISA does not address the question, the courts have looked to federal common law to determine the standards such a waiver must satisfy in order to be enforceable. They have held that the waiver is enforceable if it is specific, knowing, and voluntary. *See Melton v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003); *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Clift v. Clift*, 210 F.3d 268 (5th Cir. 2000); *Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999), *cert. denied*, 531 U.S. 924 (2000); *Hill v. AT&T Corp.*, 125 F.3d 646 (8th Cir. 1997); *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78, 81-82 (4th Cir. 1996); *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir.), *cert. denied*, 516 U.S. 868 (1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995); *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 280 (7th Cir.) (en banc), *cert. denied*, 498 U.S. 820 (1990); *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). That is the rule followed by the Texas Supreme Court in this case.

Although it is not entirely clear, Keen's principal argument in her petition for writ of certiorari appears to be that the rule recognizing waivers of beneficiaries' interests in employee benefit plans contravenes the text of ERISA. Keen says, "ERISA recites that the plan must

specify the basis upon which payments are to be made, states that the plan administrator must administer the plan in accordance with the plan documents and then directs that the plan administrator must pay the plan benefits to the designated beneficiary. ERISA §§ 1002(8), 1002(a)(1)(D)[1] and 1102(b)(4)." *Petition* at 8. Apparently, Keen construes these provisions as mandating that the plan administrator *always* pay *only* the designated beneficiary, regardless of the circumstances.

Keen's construction is clearly wrong for a number of reasons. Foremost, the provisions on which Keen relies – sections 3(8), 402(b)(4), and 404(a)(1)(D) of ERISA – simply do not say what Keen says they do. They merely define "beneficiary," state that an employee benefit plan must "specify the basis on which payments are made to and from the plan," and provide that a fiduciary must discharge his duties in accordance with the plan documents. Those sections are utterly silent as to the effect of waivers or assignments of benefits.

ERISA, however, is not silent on the subject. Section 206(d)(1) of ERISA – the so-called "spendthrift" or "anti-alienation" rule – provides, "Each pension plan should provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The Court addressed the effect of this rule on ERISA's preemptive scope in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In *Mackey*, the Court considered

[1] This citation is erroneous. Weaver assumes that Keen meant to cite 29 U.S.C. § 1104(a)(1)(D).

the question of whether state laws providing for garnishment of employee welfare benefits are preempted by ERISA. The Court rejected the petitioners' argument that ERISA's preemption provision – section 514(a), 29 U.S.C. § 1144(a) – preempts state garnishment laws as applied to employee welfare benefit plans as well as to employee pension plans. Significantly, the Court's decision turned on the scope of the anti-alienation rule. That rule bars the alienation or assignment of benefits provided for by ERISA pension, but not welfare, plans. 29 U.S.C. § 1056(d)(1). The Court stated, "If we were to give ERISA § 514(a) the meaning which petitioners and the United States attribute to it – barring garnishment of all ERISA plan benefits – we would render § 206(d)(1) substantially redundant with § 514(a), as they concede. . . . As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of the same law." 486 U.S. at 837. Thus, the Court found that ERISA does not preempt state garnishment laws as applied to welfare benefits because section 206(d)(1) only applies to pension benefits.[2]

Keen's argument suffers from the same fundamental flaw as the petitioners' argument in *Mackey*. If, as she says, other provisions of ERISA provide that a beneficiary may not waive her interest in benefits, then section 206(d)(1) would be superfluous. Moreover, if the provisions

---

[2] As explained in more detail below, the anti-alienation rule does not bar Keen's waiver in this case because it does not apply to the interests of beneficiaries. Moreover, even if it did, the divorce decree would be enforceable because it substantially complied with the requirement for a qualified domestic relations order ("QDRO"), which is an exception to the anti-alienation rule. *See* 29 U.S.C. § 1056(d)(3).

of ERISA upon which Keen relies dictate that a plan administrator may never pay benefits to anyone other than the participant or the designated beneficiary, then the Court's decision in *Mackey* that welfare benefits may be garnished would be incorrect. Thus, *Mackey* is fatal to Keen's central legal theory.

Finally, it is significant that, if Keen's central theory were correct, then ERISA would prohibit the assignment of both welfare and pension plan benefits. Every circuit that has addressed the question, however, has held – in light of the Court's reasoning in *Mackey* – that assignments of employee welfare benefits are enforceable. *See St. Francis Regional Medical Center v. Blue Cross & Blue Shield of Kan., Inc.*, 49 F.3d 1460, 1464 (10th Cir. 1995); *Lutheran Medical Center v. Contractors, Laborers, Teamsters & Engineers Health and Welfare Plan*, 25 F.3d 616, 618-20 (8th Cir. 1994); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277 (6th Cir. 1991), *cert. dismissed*, 505 U.S. 1233 (1992); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 250 (5th Cir. 1990); *Misic v. Building Service Employees Health and Welfare Trust*, 789 F.2d 1374, 1376-77 (9th Cir. 1996).

The decision of the Supreme Court of Texas in this case is not contrary to section 3(8), 402(b)(4), or 404(a)(1)(D) of ERISA.

Keen also repeatedly says that the Texas court's decision in this case conflicts with *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). The only issue in *Egelhoff*, however, was whether ERISA preempts a Washington statute providing that the designation of a spouse as the beneficiary of an employee benefit plan is revoked automatically upon divorce. In *Egelhoff*, the Court found that the law was

preempted. Thus, as far as *Egelhoff* goes, it simply confirms the propriety of the Texas Supreme Court's conclusion in this case that federal law preempts the Texas state law counterparts to the Washington law found preempted in *Egelhoff*. What *Egelhoff* does not address is the issue in this case: whether, under ERISA, a beneficiary may waive her rights to benefits in favor of the participant. *Egelhoff* simply does not control here.

Indeed, the only decision Keen cites that even superficially supports her position is *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990). In that case, the designated beneficiary, the participant's former wife, and the participant had entered into a joint settlement upon their divorce. In the settlement agreement each party relinquished "any and all claims" against the other. The Sixth Circuit nevertheless held that the beneficiary did not effectively waive her interest in the participant's pension benefits. In doing so, the Sixth Circuit relied on section 404(a)(1)(D) of ERISA, which provides that the plan administrator shall discharge his duties "in accordance with the documents and instruments governing the plan. . . . " 29 U.S.C. § 1104(a)(1)(D). According to the court, that means that "it was [the participant's] designation which controls, not [the beneficiary's] intent." *Id.* at 312. Alternatively, the court found that the beneficiary's waiver was not sufficiently specific to be effective under federal common law. *Id.* The court mentioned ERISA's anti-alienation rule but declined to discuss its applicability, *id.* at 312 n.1, and the opinion does not mention qualified domestic relations orders ("QDROS"), which are an exception to the anti-alienation rule and ERISA's preemption provision. In any event, one of the court's

alternative rationales in *McMillan* provides some support for Keen's position.

More recently, however, the Sixth Circuit decided *Metropolitan Life Insurance Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997). In that case the participant and the beneficiary entered into a divorce decree in 1978 in which the beneficiary allegedly waived her claim to certain life insurance benefits. Unlike its previous decision in *McMillan*, however, this time the Sixth Circuit considered the potential application of ERISA's anti-alienation rule and the QDRO exception. The court properly found that the anti-alienation rule was not implicated in the case because the life insurance benefits at issue were an employee welfare benefit, whereas the anti-alienation rule applies only to employee pension benefits. The Sixth Circuit also concluded, however, that a QDRO is enforceable with respect to employee welfare benefits as well as to employee pension benefits. The divorce decree in question, though, was entered into before the enactment of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) ("REA"), which amended ERISA to add the QDRO exception to the anti-alienation rule. The divorce decree at issue in *Marsh* did not comply with all of the statutory requirements for a QDRO. The court concluded, however: "As the divorce decree was written before the REA amended ERISA in 1984, we should not demand literal compliance where Congress' intent has been to give effect to domestic relations orders where it is clear what the decree intended." 119 F.3d at 422. Thus, the court found that the divorce decree effectively waived the beneficiary's interest because it "substantially complied" with ERISA's requirements. *Id.*

Marsh indicates that the Sixth Circuit will recognize a beneficiary's waiver where the waiver is contained in a QDRO or, if the waiver occurred before the effective date of the REA, where it is clear what the beneficiary intended. This is consistent with the court's alternative holding in *McMillan* that the waiver in question in that case was not sufficiently specific to be enforceable under federal common law. In this case, the divorce decree between Keen and Frank was entered into in 1982, two years before the enactment of the REA. Moreover, although the divorce decree and agreement incident to divorce may not meet all of the technical requirements for a QDRO – for instance, they do not state Frank's or Keen's "last known mailing address," 29 U.S.C. § 1056(d)(3)(C)(1) – they substantially comply with them. Indeed, they could hardly be more specific. Section 3.02 and schedule 2 of the agreement specifically refer to Frank's "retirement" and "pension" plans, including "The Teachers' Insurance and Annuity Association – College Retirement Equities Fund." As the Texas Supreme Court found, the "waiver was . . . specific and clear." It is hardly surprising, then, that Keen has never even *contended* that she did not intend to surrender her beneficiary interest in the TIAA Contract and the CREF Certificate. Thus, even in the Sixth Circuit's view, Weaver would prevail.

The decision of the Supreme Court of Texas in this case is not in conflict with the text of ERISA, the Court's decision in *Egelhoff*, or the decisions of the Sixth Circuit. In fact, all dictate that Keen effectively waived her interest in the annuity contracts.

B. The decision below does not violate ERISA's "anti-alienation" rule.

Keen also argues that the decision of the Texas Supreme Court in this case is in conflict with ERISA's anti-alienation rule. *See* 29 U.S.C. § 1056(d)(1). Keen simply asserts, without explanation, that under the anti-alienation rule Keen, as a beneficiary, could not assign or alienate her "benefits" in Frank's pension plans.

Significantly, Keen ignores the Texas Supreme Court's holding that the anti-alienation rule applies to participants, but not to beneficiaries. The distinction is not a minor one. A participant is "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . . " 29 U.S.C. § 1002(7). A beneficiary, on the other hand, is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.* at § 1002(8). Thus, generally the participant is the employee whose service resulted in the accrual of benefits, whereas the beneficiary is simply a person designated by the participant to receive the benefits in the event of his death. *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 704 n.3 (4th Cir. 1986). Not surprisingly, then, virtually all of ERISA's provisions governing participation, vesting, and funding of pension benefits focus on the interests of employees, *i.e.*, participants, not on beneficiaries. *See* 29 U.S.C. §§ 1051-1086. The anti-alienation rule is in the midst of these provisions.

Significantly, both federal courts of appeals that have faced the question have held that the anti-alienation rule

simply does not apply to beneficiaries. As the Seventh Circuit explained:

> The spendthrift provisions of ERISA are designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. H.R. Rep. No. 807, 93d Cong., 2d Sess. 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4734. These provisions focus on the assignment or alienation of benefits by a *participant*, not the waiver of a right to payment of benefits made by a designated beneficiary.

Fox Valley & Vicinity Constr. Workers Pension Fund, 897 F.2d at 279-80 (emphasis added); *accord Estate of Altobelli*, 77 F.3d at 81. This conclusion is inescapable given the contingent nature of a beneficiary's interest. Under ERISA a participant ordinarily may change his beneficiary at any time during his lifetime. Thus, the beneficiary's interest in pension benefits is contingent not only on the beneficiary surviving the participant, but also on her remaining his designated beneficiary. She has no "vested" benefits that she can squander, at least while the participant is alive.

The propriety of this analysis is particularly clear where, as here, the beneficiary waives her "right" to the participant's benefits in an agreement with the participant himself. As the Fourth Circuit observed:

> We agree with the Seventh Circuit that the anti-alienation clause does not apply to a beneficiary's waiver. As the Supreme Court has noted, the purpose of the clause is "to safeguard a stream of income for pensioners (and their dependents . . .)." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376, 110 S. Ct. 680, 687, 107

> L.Ed.2d 782 (1990). To bar a waiver in favor of the pensioner himself would not advance that purpose.

Estate of Altobelli, 77 F.3d at 81. Similarly, barring a waiver in favor of Frank in this case would not serve the purposes of the anti-alienation rule.[3]

The language of the provision of ERISA that sets forth the requirements for a QDRO reinforces the conclusion that the anti-alienation rule does not apply to beneficiaries' unvested interests. In providing for a QDRO, the statute nowhere alludes to the right of "beneficiaries" or "benefits of beneficiaries." On the contrary, it says that the anti-alienation rule "shall apply to the creation, assignment, or recognition of a right to any *benefit payable with respect to a participant* pursuant to a domestic relations order" unless the order qualifies as a QDRO. 29 U.S.C. § 1056(d)(3)(A) (emphasis added). Similarly, one requirement for a QDRO is that it "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to receive all or a portion of the *benefits payable with respect to a participant* under a plan." *Id.* at § 1056(d)(3)(B)(i). Thus, ERISA creates the

---

[3] Indeed, if the anti-alienation provision prohibited a beneficiary's assignment of her unvested right to benefits to a participant, then the provision would also prohibit a participant from changing his beneficiary because that would be an "alienation" of the beneficiary's "right" to benefits. But a participant may change his beneficiary designation at any time. Moreover, Keen's view of the law would result in the anomaly that a beneficiary could not surrender her benefit "rights" in exchange for valuable consideration from the participant when, in fact, the participant is free at any time to deprive the beneficiary of any claim for benefits by simply designating another person as the beneficiary. Keen's position simply cannot be squared with the statute.

QDRO as a way for a participant, but not for a beneficiary, to "assign" or "alienate" pension benefits because the anti-alienation rule covers only participants.

Finally, even if the anti-alienation rule applied to a beneficiary's voluntary assignment of her right to benefits to the participant, this case has been properly decided. Keen simply assumes, without discussion, that her divorce decree does not meet the requirements for a QDRO. As noted above, however, Frank and Keen entered into the decree in 1982, before Congress invented the QDRO when it amended ERISA by enacting the REA. Courts have held that ERISA does not require "literal compliance" with the QDRO requirements for domestic relations orders entered into before January 1, 1985; it suffices if it is clear what the decree intended. *Metropolitan Life Ins. Co. v. Bigelow*, 283 F.3d 436, 443 (2d Cir. 2002); *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d at 422. Indeed, even courts applying the QDRO requirements to post-REA domestic relations orders have not required literal compliance with those requirements. *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1151-54 (9th Cir. 2000), *cert. denied*, 531 U.S. 1074 (2001); *Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1085 (7th Cir. 1994). As noted above, the divorce decree at issue here substantially complied with the requirements for a QDRO. Thus, especially given that Keen has never even *contended* that she did not intend to relinquish any claim to Frank's retirement benefits, there is every reason for a court to enforce the clear provisions of the decree.

CONCLUSION

The courts of appeals have concluded that a beneficiary's voluntary, explicit waiver of her right to benefits is enforceable under ERISA. Neither the text of ERISA nor *Egelhoff*, a preemption case, dictates a different result. Keen's argument based on ERISA's anti-alienation rule is incorrect for a number of reasons, most fundamentally because the anti-alienation rule does not forbid a beneficiary's waiver of her interest in favor of the participant. In any event, Frank and Keen's divorce decree pre-dates the effective date of the REA, and there is no reason for a court to disregard the decree's plain terms and Frank's and Keen's undisputed intent. The petition for writ of certiorari should be denied.

Respectfully submitted,

THOMPSON & KNIGHT LLP

STEVEN W. SLOAN
RUSSELL G. GULLY
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
Telephone: (214) 969-1700
Facsimile: (214) 969-1751

Attorneys for Respondent